CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

DECEMBER 1, 1902 TO JANUARY 5, 1903.

REPORTED BY

M. R. SMITH, of the Farmington Bar,
AND
BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

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*Hon. VALLE REYBURN, } *Judges.*
Hon. RICHARD L. GOODE, }

John H. Murphy, *Clerk.*
M. R. Smith, *Reporter.*

Judges of The Kansas City Court of Appeals.

Hon. JACKSON L. SMITH, *Presiding Judge.*

Hon. JAMES ELLISON, } *Judges.*
Hon. ELBRIDGE J. BROADDUS, }

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*On January 1, 1903, Hon. Valle Reyburn succeeded Hon. Shepard Barclay, having been elected to the position at the previous November election.

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1902.

(Continued from Volume 96.)

MOLLIE B. FAIRALL et vir, Respondents, v. CITY OF CAMERON, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Municipal Corporations:** NEGLIGENCE: PLEADING: PETITION: WAIVER. A petition summarized in the opinion and inartificially drawn, defectively states a good cause of action for negligence of the defendant city in failing to keep its sidewalks in a reasonably safe condition for travel; and the defects were waived by failing to call them to the court's attention before trial.

2. **Evidence:** DEPOSITION: IMPEACHMENT OF WITNESS. Plaintiff took the deposition of a physician. At the trial defendant read the deposition. Plaintiff, with a view to contradicting it, introduced a conversation of the physician with another witness, to which the defendant objected on the ground that the plaintiff could not contradict his own witness. *Held*, without deciding the question, that the conversation corroborated the physician.

3. **Municipal Corporation:** DEFECTIVE SIDEWALK: NOTICE: INSTRUCTION. An instruction relating to the notice of the defective condition of the sidewalk is held not to conflict with other instructions, but to be incomplete, and a harmless error, when taken in connection with other instructions.

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4. ———: NEGLIGENCE: DEFECTIVE SIDEWALK: INSTRUCTION. An instruction telling the jury if the sidewalk was "in an unsafe condition for persons passing over," etc., "then they should find," etc., is held to be harmless error since taken with the other instructions and accompanying verbiage the jury must understand that "unsafe condition" as used, meant not reasonably safe.

5. **Damages**: VERDICT: EXCESSIVE: EVIDENCE. On the evidence where it is plain that the jury believed the plaintiff's witnesses and not the defendant's, a verdict for seven hundred and sixty dollars for a personal injury on the sidewalk is held not excessive.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes,* Judge.

AFFIRMED.

John A. Livingstone, William Henry and *James E. Goodrich* for appellant.

(1) The petition fails to state a cause of action in that it nowhere states that defendant was negligent or negligently failed to make or repair its sidewalk, or that it was not in a state or condition reasonably safe for travel thereon by the traveling public, which is the test of the defendant's liability. Bonine v. Richmond, 75 Mo. 440. (2) As to the proper condition of the streets and sidewalks of a city the test is, that they be reasonably safe for travel thereon in the usual modes of travel. Kiley v. Kansas City, 87 Mo. 106, and cases there cited. (3) As to the obligation of the city to maintain the streets and sidewalks, it is only under a duty to exercise ordinary care to keep them in that condition. Nixon v. Railroad, 141 Mo. 437. (4) When, therefore, a street gets out of repair the city has not only a reasonable time in which to discover the defect, but also a reasonable time in which to remedy the fault after such discovery. Banstian v. Young, 152 Mo. 325; Reedy v. Brewing Ass'n, 161 Mo. 539; Dietrick v. Railroad, 89 Mo. App. 39. (5) Dr. Lindley was called by plaintiff to give a deposition, and plaintiff thereby vouched for his credibility. Under the facts in evi-

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dence he could not be impeached by plaintiff. Edwards v. Crenshaw, 30 Mo. App. 510; Price v. Lederer, 33 Mo. App. 426.

Crosby Johnson & Son and *Frank B. Ellis* for respondents.

(1) Even though the petition was defective, it is too late to raise the point in this court. Lemser v. Mfg. Co., 70 Mo. App. 209; Lynch v. Railroad, 111 Mo. 601. The Bonine case, 75 Mo. 437, involved no question of pleading, but of instruction only. (2) Even though plaintiff's second instruction was defective in failing to state that defendant was entitled to time to repair after discovery of the defect, such defect was cured by the other instructions saying the city was entitled to such time. McBeth v. Craddock, 28 Mo. App. 280; Haver v. Schyhart, 48 Mo. App. 50. (3) The measure of damages was the award of a jury, not influenced by prejudice or passion and having a due regard for the evidence in the case. Winkler v. Railway, 21 Mo. App. 109; 3 Sutherland on Damages, sec. 1242. (4) An error in admission of evidence or in the instructions, which did not mislead or prejudice the jury, is not ground of reversal. Wagner v. Edison, Co., 82 Mo. App. 288; Link v. Prufrock, 85 Mo. App. 618; Jones v. Poundstone, 102 Mo. 240.

BROADDUS, J.—This is a suit against the city of Cameron, Missouri, to recover damages resulting from an alleged injury to plaintiff, Mollie B. Fairall, caused by a fall on a sidewalk alleged to have been defective. The plaintiff's evidence tended to show that in the month of December, 1900, while she was passing over a sidewalk on Harris street in said city in company with two other women, a board in the walk was stepped on by one of her companions in such a manner that it tilted up and tripped the plaintiff, throwing her down and injuring her; and that said sidewalk had been in a bad condition long prior thereto by reason of the rotten

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condition of the boards and stringers composing the same. There was a trial before a jury which resulted in a verdict for the plaintiff in the sum of $760, upon which judgment was rendered. The defendant has appealed.

One of the grounds assigned for a reversal is that the petition does not state a cause of action in this: that it does not state that the sidewalk in question was defective or out of repair through the negligence of the defendant. The petition after alleging it was the duty of the defendant to keep its streets and sidewalks in good and safe condition for the passage of travelers, proceeds to allege that the sidewalk on Harris street where plaintiff was injured was made of wooden stringers with boards laid crosswise on them and had become old and rotten; that the boards had become loose from the stringers because the nails were old, rusted and broken, and from various other alleged defects, so that when stepped upon they were liable to tip up; that in December, 1900, the plaintiff, Mollie B. Fairall, in company with two others, while walking along said sidewalk, unaware of the danger of using the same, was thrown down by reason of one of the boards tilting up under the foot of one of her companions and catching her foot while she was in the act of stepping over a hole in said walk made by the absence of two boards therein; that said defects had existed for a long time prior to her injury and were known, or should have been known, by the defendant in the exercise of reasonable care; and that she was seriously injured by the fall.

The petition, which is founded upon a cause of action against defendant city for negligence for a failure to keep its sidewalks in a reasonably safe condition for persons using them, is remarkable for a failure to use the word negligence. It in no instance charges that the acts complained of were acts of negligence, nor does it charge that the sidewalk in question was not reasonably safe for travel. The defendant's counsel seem to think that these omissions constitute a fatal defect in

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the pleading. It is usual in cases of this kind to allege that the acts of omission or commission were the result of negligence, but we are not prepared to say that for the absence of such averments the pleading is fatally defective. There is no doubt but what the omissions of duty on the part of the defendant as alleged in the petition was negligence. The law characterizes such conduct as negligence. It was not indispensable that the pleader should charge that the defendant was negligent in omitting to perform a duty it owed to the traveling public if the acts of themselves constituted negligence. And if such acts did not amount to acts of negligence, a charge that they were negligent acts would not strengthen their force. Section 592, Revised Statutes 1899, prescribes in a general way the form for a petition, viz.: "First, the title of the cause . . . ; second, a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; third, a demand of the relief to which the plaintiff may suppose himself entitled."

The petition in question substantially complies with the requirements of the code, though it is inartificially drawn. It is true, it contains unnecessary repetition of the facts and lacks conciseness, but the courts have never in construing the statute gone to the length of holding that a petition was bad for that reason. The term "concise statement" is a relative term, and it would be impossible to formulate a precise rule in any case; therefore, the statute must be liberally construed. Leaving out the fact that it is lamentably inartificial, the petition at most is subject only to the criticism that it is a defective statement of a good cause of action. And the objection that it alleges that it was the duty of the defendant to provide "safe," instead of "reasonably safe" sidewalks for the use of the traveling public can make no difference, as the duty of the defendant in that respect is a matter of law and can not be enlarged by an affirmative allegation. A misstatement of the law did not have the effect of making the petition bad. If the statement of facts authorized the plaintiff to re-

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cover, she was entitled to recover under the law as it was and not as it might be claimed in the pleading. All mere defects in the petition were waived by the defendant by its failure to call the attention of the court to them before trial. There was no motion or demurrer interposed before trial.

The defendant asks that the cause be reversed because of error in the admission of incompetent evidence and the giving of improper instructions in behalf of the plaintiff over the objections of the defendant. The record discloses that the plaintiff, previous to the trial, had taken the deposition of a Dr. Lindley but did not offer it at the trial, same being read on behalf of the defendant. Crosby Johnson, one of plaintiff's witnesses, testified that prior to the taking of the said deposition Dr. Lindley told him that he had treated the plaintiff for an injury to her side. The defendant contends that as the plaintiff took the deposition of Dr. Lindley that she thereby vouched for his credibility and was not authorized to impeach him by proving that he had made a statement in the deposition different from that made to the witness. Without going into the question whether the plaintiff, after she had taken Dr. Lindley's deposition, although not using it on the trial, was authorized to discredit him when his deposition was used by the defendant, we hold that the evidence of Crosby Johnson did not tend to impeach Dr. Lindley but on the contrary its tendency was the reverse, inasmuch as Dr. Lindley in his deposition did state that he had treated the plaintiff for an injury to her side.

The defendant is also mistaken as to the evidence of Catherine Nixon. It is claimed that she was permitted to testify that she had also fallen on the sidewalk in question by reason of its defective condition. The record fails to disclose any such testimony.

Particular objection is made to instruction number two given on behalf of the plaintiff. Said instruction is faulty for the reason that it fails to tell the jury that if they find that the sidewalk in question was unsafe. notice of its defective condition must have been had

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such a reasonable length of time before the accident as to have enabled defendant to have repaired it. But instruction number one given for the plaintiff is not subject to such objection. Substantially, it is to the effect that in order to make the defendant liable for injury resulting from its defective condition, if it was defective, the defendant must have had notice of its defect for such a length of time as to enable defendant to have made repairs before the accident. Instruction number three given for the defendant also contains a correct declaration of the law in that respect. Said instruction number two is not in conflict with the other two, but its fault is one of incompleteness; and it seems to us that its defect was cured by the two properly given. Merchants Ins., Co. v. Hauck, 83 Mo. 21; McBeth v. Craddock, 28 Mo. App. 380; Link v. Prufrock, 85 Mo. App. 618.

But objection is made by defendant to plaintiff's fifth instruction, the language of which in reference to the duty of defendant as respects its sidewalks, is as follows: "The jury are instructed that it was the duty of the defendant to keep its streets and sidewalks in a proper state of repair for the use of the traveling public; and if you find from the preponderance of the evidence that the sidewalk in the city of Cameron over which the plaintiff was passing was in an unsafe condition for the persons passing over," etc. It was held in Nixon v. Railroad, 141 Mo. 437, that an instruction which told the jury that it was the duty of the railroad company to keep its crossing over a public road in a safe condition for the use of travelers, was erroneous; that its duty went no further than to keep such crossings in a reasonably safe condition for travel. But as instructions numbers one and two of plaintiff, and three and six of defendant, properly defined the duty of the defendant city in providing suitable sidewalks for public use, we do not see how the jury could have been misled, especially in view of said sixth instruction which is as follows: "The court instructs the jury that the defendant is not an insurer against accidents upon its

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streets or sidewalks, nor is every defect therein a ground of liability though it may cause an injury, but the defendant city performs its full duty if the streets and sidewalks are kept reasonably safe for persons passing over them, using ordinary care and prudence, and if you believe that the sidewalk at the place where the plaintiff received her injury, if any she received, was in a reasonably safe condition, then plaintiff can not recover in this action, and your verdict will be for the defendant." Taken all in all, it is not reasonable to suppose that the jury could have been misled upon the question of the duty of the defendant respecting its sidewalks. The jury must have understood that the defendant was not required to keep its sidewalks in an absolutely safe condition for travel. They were bound to know that the term "unsafe condition" did not mean that any kind of defect in the sidewalk which caused plaintiff's injury would render defendant liable. At most, the expression that it was "the duty of the defendant to keep its streets and sidewalks in a proper state of repair" and that if said sidewalk was "in an unsafe condition" is not equivalent to saying that the city was bound to keep its streets and sidewalks in a "safe condition" in an unqualified sense. The jury should have understood that the expression "in a proper state of repair" meant, in connection with the other instructions, a reasonable state of repair; and "unsafe condition," as used, meant not reasonably safe.

The appellant contends that the verdict of the jury is excessive. The evidence shows that plaintiff received an injury as the result of a fall on the sidewalk in question and that she complained of a pain in her side where, it appears from the evidence of her doctor, there was some external evidence of such injury. According to the evidence of plaintiff's doctor and others, the injury was a serious one causing much pain and discomfort, but from which she will probably recover. The defendant's evidence tends to show that the plaintiff's suffering was not the result of the so-called in-

jury received from the fall, but the result of an impaction of the colon with fecal matter. The case presents another illustration that doctors will disagree. If the jury believed the plaintiff and her witnesses and disbelieved the defendant's medical experts, which it no doubt did, we can very well understand that the verdict with such view of the case is not excessive.

Finding no substantial error, the cause is affirmed. All concur.

In re WEBB STEELE'S ESTATE.

Kansas City Court of Appeals, December 1, 1902.

1. **Guardian and Curator:** CURATOR'S COMPENSATION. Where a curator is not required to give any considerable part of his time to the collection and preservation of his ward's estate, his allowance under the statute is five per cent upon the whole amount of money received.

2. ———: COMPENSATION: ATTORNEY'S FEE: COURT QUESTION. While a curator who is an attorney may employ the services of a lawyer, it is still a question for the court to determine the necessity of such services and their value.

3. ———: ANNUAL SETTLEMENTS: JUDGMENTS: EVIDENCE. The annual settlements of a curator are judgments and constitute a prima facie case in his favor which may, as in this case, be overcome by other evidence.

4. ———: COURT'S DUTY. The court should guard with great care the interest of minors and protect them against the cupidity of others.

Error to Buchanan Circuit Court.—*Hon. W. K. James*, Judge.

AFFIRMED.

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Vinton Pike for plaintiff in error.

(1) The case admits that Owen was a faithful trustee, that his conduct is above criticism and his service meritorious. The only issue in the case, and the only one that ever was in it, is as to the amount of compensation. Two courts have passed upon it, the first one on several occasions, when it was better advised than the last one. The action of the first made a prima facie case for the curator. In the second court that prima facie case was not overcome by evidence, but the judge set up his own judgment against the judgment of the first court, the prima facie case and the weight of the evidence and upon independent grounds fixed "in lump" what he thought should be just for each curator and attorney. This is contrary to settled law. State ex rel. v. Strickland, 80 Mo. App. 401; State ex rel. v. Elliott, 82 Mo. App. 458; Ansley's Estate, 68 S. W. 609. (2) The finding is a substantial approval of every item for which compensation was allowed by the probate court. The circuit judge thought it was more just to pay in bulk after services were rendered and a survey of all that had been done and the results could be had. That view is too one-sided. A curator can not obtain assistance of counsel free. Such assistance is not compulsory. It must be paid for and the counsel employed is entitled to some consideration. What was just and right then, although individuals may disagree about it now, is the criterion. (3) It was urged in the court below, and doubtless will be here, that the compensation allowed was for administering an estate of $3,400. The circuit judge may have taken that limited view of the case. But that view is neither adequate nor fair. The curator and his attorney saved from jeopardy a trust fund of $10,000. They realized out of the homestead $4,300 more than other parties estimated it to be worth. They recovered in the circuit court in Pitts v. Weakley the ward's share in the 794 shares of stock, worth, since it appears the company was solvent, more than $25,000. They lost on appeal, but the suc-

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cess in the trial court justified the suit. If the decree had been affirmed there would have been no complaint of the allowance. The attorney's services were not worth less because of the ultimate failure of the suit. (4) The rule which treats the allowances by the probate court as prima facie correct means that the probate court fully and properly considered the whole matter and its action shall stand until the whole matter is again presented. The burden is on the ward to make the showing. Ladd v. Stephens, 147 Mo. 219; 1 Green. Evid., sec. 33.

Mosman & Ryan for defendant in error.

(1) The only question before this court on this appeal is, was there sufficient evidence to support the finding and judgment of the trial court? The *onus probandi,* therefore, is upon the plaintiff in error to show this fact from the record. The judgment of the trial court is prima facie to be considered a right decision. Kinney v. Vallingham, 9 Mo. App. 107. When the record is incomplete all presumptions are in favor of the correctness of the proceedings, rulings and judgments of the trial court. Vaughn v. Railroad, 34 Mo. App. 141; Missouri Appellate Practice, page 104; Routsong v. Railroad, 45 Mo. 236. (2) The trial court not only had the advantage of seeing the witnesses, hearing all the oral testimony offered as to the nature and kind of services performed by the curator and his attorney, but also had the opportunity of examining the records and papers of the probate court, in connection with the administration of this estate. (3) Counsel for plaintiff in error recognize that the compensation asked by the curator for himself and attorney is unreasonable for the services rendered, and attempt to justify the same on the ground that the curator performed special and extraordinary services in securing the trust fund that Weakley held and in securing a purchaser, who paid a good price for the real estate sold in partition. If he had performed this service it would have been only the usual duty imposed upon him in

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caring for the estate and he is entitled to no extra compensation therefor. (4) We concede the law to be that an annual settlement of a curator approved by the probate court is prima facie correct, but in this case evidence was introduced before the trial court both as to the service rendered, and as to the value of the same. This evidence fully overcome the presumption in favor of the annual settlement, therefore the authority cited in appellant's brief upon this point has no application to the facts in this case. (5) While in this class of cases the appellate court is not concluded by the finding of the trial court, yet on account of the superior advantage which the trial court possesses of weighing the evidence and judging of the credibility of the witnesses, much deference is given to its findings. Parker v. Roberts, 16 Mo. 657; Blunt v. Spratt, 113 Mo. 48; Toller v. McCabe, 52 Mo. App. 532. The finding of the court below will be deferred to unless it has manifestly disregarded the evidence. Snell v. Harrison, 83 Mo. 652.

BROADDUS, J.—This appeal grows out of the final settlement of Herbert A. Owen as curator of the estate of Webb Steele, in which the curator charged himself with $3,481.23 and asked credit for $1,249.27, which left a balance in his hands of $2,231.96. Exceptions were filed in the probate court to certain allowances in favor of the curator. The case was appealed to the circuit court where the exceptions were partly sustained and curator's account restated, whereupon he appealed to this court.

The following items are in controversy, viz:

April 1, 1896, John M. Stewart, on account of attorney's fee, $100.

August 21, 1896, John M. Stewart, attorney fee, $50.
January 4, 1898, John M. Stewart, attorney fee, $50.
July 18, 1898, John M. Stewart, attorney fee, $20.
August 29, 1898, John M. Stewart, attorney fee, $50.
August 28, 1899, John M. Stewart, attorney fee, $25.
August —, 1900, John M. Stewart, attorney fee, $10.

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August 21, 1896, H. A. Owen, services as curator, $100.

August 29, 1898, curator's compensation, $25.

August 28, 1899, curator's compensation, $250.

August —, 1900, curator's compensation, $25.

All these items were allowed by the probate court, which allowances were excepted to by the ward who appealed to the circuit court, as aforesaid, where the case was heard, upon which hearing the court restated the curator's accounts and reduced his fees from $400 to $250, and fees for attorney from $305 to $200.

The curator has appealed to this court and assigns as a ground for reversal that the action of the trial court was not justified by the evidence.

It was disclosed by the evidence that all the estate that came into the curator's hands, except a library appraised at $125, was realized from rents, from the administrator of Mildred E. Steele on orders of distribution, and from the sheriff of the ward's distributive share growing out of a sale in partition. There was no trouble attending the collection of the money constituting the ward's estate. But the record further discloses that there was another estate in which the ward had an interest, and one in which it was at first supposed he had some interest but later decided to the contrary.

There was $10,000 in the hands of one Beattie Weakley, who held it in trust without bond for Webb Steele, the ward herein. The curator deemed it a duty he owed his ward to require the trustee, Weakley, to secure said sum; and for that purpose he instructed his attorney to prepare a petition and file it in the circuit court of the county for the purpose of compelling said trustee, Weakley, to give bond to secure said trust money. The attorney prepared and filed the necessary petition in the circuit court, upon notice of which said Weakley executed a bond, prepared by said attorney, with satisfactory security. The record does not show that the curator was allowed any par-

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ticular sum for the services of his attorney in said matter.

There was another suit in which the ward was joined as plaintiff with another party against Susan B. Weakley and her husband for the recovery of certain stock which it was charged they held in trust for the plaintiffs in that suit. It does not appear that the curator's attorney, Mr. Stewart, rendered any important services in the case, and the record here does not show that the curator was allowed any sum as compensation for said attorney's services in the matter. But it does appear that on August 29, 1898, John M. Stewart, the attorney, presented a bill of $120 for services rendered the minor in litigation in the circuit court, and for other services. The bill, however, is not copied into the record. Said Stewart, however, testified on the trial as to the services he rendered in the two cases. As to the first case mentioned, his evidence was in substance that he had much trouble in getting Weakley, the trustee, who was insolvent, to make a bond to secure the money in his hands belonging to the ward; that it required considerable diplomacy, and that he was bothered with the business about a month. W. D. Rusk, a member of the Buchanan county bar, testified that ordinarily a fee of twenty or twenty-five dollars would be a reasonable compensation for such service, but that under the facts as stated by Mr. Stewart such services would be worth one hundred dollars. Weakley, the trustee, testified that when he got notice of the application he promptly gave the desired bond.

The estate in the hands of the curator does not appear to have been involved in any dispute or litigation whatever. All that the curator did with respect to it was to collect certain rents due his ward, and to receive his distributable share from the administrator of Mildred E. Steele, and his share of the proceeds of said partition sale.

An inspection of the final settlement shows that the money for which the curator asks credit, except for court costs and small sums paid the ward from time

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to time, were mostly allowances to himself as compensation for his services, and for the services of his attorney. The whole amount for which the curator received credit was $1,249.79, of which sum $705 was for himself and his attorney. There is no statement in the record showing in detail the services rendered by the curator. It does not appear that he was put to any expenditure of his time in preserving the estate, as from its nature he could not well have been. Under such circumstances his allowance under the statute should have been five per cent upon the whole amount of $3,481.23, or, in other words, $174.06. As the record does not show that he gave any considerable part of his time to the proceedings to compel Weakley to give bond to secure the trust funds of his ward in said Weakley's hands as trustee, we think the court may have properly found that an allowance of $250 would be ample compensation for all his services.

Judging from the items of which they are composed, the annual settlements of the curator were not complicated. They were plain matters of debit and credit, not involved with legal questions and requiring for their presentation to the probate court no greater skill than that possessed by the ordinary business man. And it was shown that the curator, who was a lawyer, was as capable of making the settlements as his lawyer. We are not holding that a curator should not be allowed, when necessary, suitable compensation to employ another lawyer to assist him, though he may be a lawyer himself. But after all, it is a question for the court to determine whether such service is necessary and what compensation shall be allowed for it.

But the appellant contends that the annual settlements of the curator are judgments and as such constitute a prima facie case in his favor. Such is the law. State ex rel v. Strickland's Admr., 80 Mo. App. 401, and other cases. And it is claimed that this prima facie case was not overcome by the evidence, but that the judge acted according to his own judgment of the matter and not upon evidence. We think, however,

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that the finding of the circuit court is amply sustained by the record. The court might well have held that there was no necessity for allowing the curator any compensation whatever for services for an attorney for making any of the settlements in issue, annual or final, as the curator himself was an attorney and competent to make them without legal assistance. The curator was allowed over twenty per cent of the entire estate in his hands as compensation for himself and attorney, which seems to us, considering the nature of the estate and the services rendered, a very extraordinary allowance.

The courts should guard with great care the interests of minors and protect them against the cupidity of the persons to whom the law has confided the custody of their property.

Finding no error, the cause is affirmed. All concur.

BRIDGET CLARK, Appellant, v. CITY OF BROOKFIELD, Respondent.

Kansas City Court of Appeals, December 1, 1902.

1. **Municipal Corporations:** DEFECTIVE SIDEWALK: NOTICE: EVIDENCE: INSTRUCTION. Direct evidence is not the only way whereby knowledge of a defect in a sidewalk may be shown, but notice thereof may be shown by reasonable inference from other facts; and an instruction telling the jury there was no evidence of actual notice to the authorities of the city is condemned on the testimony in this case, and the more so since the instruction, when taken with others, tended to confuse the jury on an important issue.

2. ———: ———: ———: RECOVERY: INSTRUCTION. An instruction relating to the elements constituting a city's liability for injuries arising from a defective sidewalk, which permitted the verdict for the defendant if the jury believed the city authorities did not know of the defect but might have known thereof if they had been diligent, is condemned especially when taken in connection with other instructions.

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3. **Evidence:** OPINION OF WITNESSES: SUGGESTION FOR ANOTHER TRIAL. It is suggested that at another trial the witnesses be kept within the rules announced in Eubanks v. Edina, 88 Mo. 650.

Appeal from Linn Circuit Court.—*Hon. John P. Butler*, Judge.

REVERSED AND REMANDED.

H. K. & H. J. West for appellant.

(1) Defendant's first instruction required the plaintiff to prove that the defendant's officers, whose duty it was to inspect and repair sidewalks, knew of the defective condition of the sidewalk, and that thereafter defendant's said authorities had time to repair the defect before the accident. This is not the law. The law is that if the defendant knew of the dangerous condition of the sidewalk, or by the exercise of reasonable diligence could have known of its dangerous condition in time to have repaired the same by the exercise of reasonable diligence before the injury, then the defendant is liable. Carrington v. St. Louis, 89 Mo. 208; Rusher v. Aurora, 71 Mo. App. 418; Eubank v. Edina, 88 Mo. 650; Fritz v. Kansas City, 84 Mo. 632; Shipley v. Bolivar, 42 Mo. App. 401; Barr v. Kansas City, 105 Mo. 550; Harris v. Chillicothe, 89 Mo. 233. (2) By defendant's instruction No. 7, the jury were told that there was no evidence of actual notice to the authorities of the defendant city of any defect in its sidewalk. In the face of this evidence it can not be said that there is no evidence that the city authorities had actual notice of the defect complained of. Evidence that the defect had existed for a considerable length of time is evidence of notice. Boxberger v. Kansas City, 68 Mo. App. 412; Fritz v. Kansas City, 84 Mo. 632; Carrington v. St. Louis, 89 Mo. 208; Cropper v. Mexico, 62 Mo. App. 385; Barr v. Kansas City, 105

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Mo. 550; Market v. St. Louis, 56 Mo. 189; Russell v. Columbia, 74 Mo. 480. (3) The court erred in permitting the defendant's witnesses to testify that in their opinion the sidewalk was good. Eubank v. Edina, 88 Mo. 650; Shoe Co. v. Bain, 46 Mo. App. 581; King v. Railroad, 98 Mo. 235.

A. W. Mullins, H. P. Lander and *C. K. Hart* for respondent.

(1) A careful reading of the first instruction asked by the respondent and given by the court discloses that the contentions of the appellant regarding the same are not well founded. Henschen v. O'Bannon, 56 Mo. 289; Porter v. Harrison, 52 Mo. 524; Rielly v. Railroad, 94 Mo. 600. (2) Instructions which are incomplete may be supplemented by other instructions. State v. Gregory, 30 Mo. App. 582; Railroad v. Vivian, 33 Mo. App. 583; Wetzell and Griffith v. Wagoner, 41 Mo. App. 509; Harrington v. Sedalia, 98 Mo. 583. (3) There was no error in giving instruction number seven on the part of the respondent. (4) The additional abstract filed by the respondent clearly shows that the third contention of the appellant's brief is not warranted by the facts. Elevator Company v. Railroad, 135 Mo. 353; Robertson v. Railroad, 84 Mo. 119; Boot and Shoe Company v. Bain, 46 Mo. App. 581.

ELLISON, J.—Plaintiff brought this action against the defendant city to recover damages for personal injuries received by falling on a sidewalk charged to be out of repair through the negligence of defendant. The judgment in the trial court was for the defendant.

The ground relied upon for reversal relates to error in instructions. By instruction number seven for defendant the jury were told that there was no evidence "of actual notice to the authorities of the city" of the defect in the sidewalk. There was no direct evidence which, in terms, showed any of defendant's officers knew of the defect. But direct evi-

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dence is not the only way whereby proof of a fact may be had. It is proper to infer a fact from other evidence. It is legitimate to draw reasonable inferences of a fact from other facts proven. In this case there was evidence tending to show that the hole in the walk had existed for a long space of time. The accident happened in December and one witness stated that the defect had existed during all the fall preceding. Others that it had existed for as long as a month. And one of the city aldermen was shown to reside within seventy-five feet of the place of accident. This was sufficient upon which to base an inference of actual notice. Carrington v. St. Louis, 89 Mo. 208; Boxberger v. Kansas City, 68 Mo. App. 412.

The instruction ought not to have been given for another consideration, viz.: Other instructions in the case, given in behalf of each party, included in the matters submitted the question of knowledge of the defect by defendant as distinguished from negligence in not knowing of it. This would tend to confuse the jury on an important issue.

We are furthermore of the opinion that plaintiff's criticism of defendant's first instruction is well founded. By that instruction the jury were told that before they could find for plaintiff it was necessary to believe four separate things: First, that the walk was unsafe. Second, that its condition was known to defendant, or might have been known if defendant had been duly diligent. Third, that after the defendant "*knew* of such condition," it had time thereafter, before the accident, to repair it. And, fourth, that plaintiff was using due care. "And if the jury believe that *any one* of the elements above mentioned are wanting, then the jury must find their verdict for defendant." Under the express terms of this instruction, if the jury did not believe that defendant knew of the defect, but yet did believe it might have known of it if it had been diligent, they must find for defendant. Connecting such unfortunate wording of that instruction with instruction number seven, above criticised, and it will be seen

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that a jury could well conclude that plaintiff had not made a case, simply for the reason that she had not shown knowledge by defendant, regardless of the further question whether defendant ought to have known. Though defendant did not know of the defect, yet if it had existed for such length of time as it might have known, had its officers exercised due and proper diligence, it would still be liable. See authorities collected in plaintiff's brief.

A point is made as to defendant calling for the opinion of witnesses in the examination, and we are cited to Eubank v. City of Edina, 88 Mo. 650, as condemning the practice in a case of this nature. Defendant contends that in point of fact the error was not committed as claimed by plaintiff. At another trial witnesses can be so clearly kept within the rule announced in that case as not to leave it a matter of dispute.

The judgment is reversed and the cause remanded. All concur.

CITY OF CARTHAGE, Appellant, v. THE CARTHAGE LIGHT COMPANY, Respondent.

Kansas City Court of Appeals, December 1, 1902.

1. **Municipal Corporations:** CONSTRUCTION: CARTHAGE SPECIAL CHARTER: ELECTRIC LIGHTS. Legislative grants to municipalities are construed strictly, and in case of reasonable doubt the power is held not granted; so the city of Carthage, under its special charter of 1875, had no power to light its streets by electricity nor to grant a franchise for that purpose.

2. ———: ———: ———: ———: VOTE. The city of Carthage, under its special charter of 1875, had no power to grant the franchise of lighting the city without a majority vote of the people; and poles and wires erected in the street under such grant constitute a nuisance.

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3. ———: THIRD-CLASS CITY: LIGHTING FRANCHISE: VOTE. Cities of the third class, under the Act of 1893 may grant the franchise of lighting the city by electricity provided the consent of the majority of the qualified voters is obtained thereto, and without such consent an attempted grant is nugatory and the grantee takes nothing that he can transfer. (Waterworks v. Webb City, 78 Mo. App. 422, distinguished.)

4. ———: ACQUIESCENCE: ESTOPPEL: PLEADING. The long acquiescence of a municipality to the exercise of a franchise can not be considered as an estoppel unless it is pleaded and relied on at the trial.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

REVERSED AND REMANDED.

H. J. Green for appellant.

(1) The city had no authority to pass ordinance No. 72. Laws 1875, page 159, section 49. If it is doubtful the question must be determined against the corporation and in favor of the public. St. Louis v. Telephone Co., 96 Mo. 626; Trenton v. Clayton, 50 Mo. App. 539; Kansas City v. Lorbe, 64 Mo. App. 608; 1 Dillon on Mun. Corp. (4 Ed.), sec. 89; Stein v. Water Supply Co., 141 U. S. 80. (2) The city had no authority to pass ordinance No. 301 or that part that attempts to grant a franchise to use the streets and alleys without a vote of the people. Laws 1893, section 95. (3) Franchises for private use without municipal authority are a public nuisance. Sherlock v. Railroad, 123 Mo. 172; Brown v. Railroad, 137 Mo. 529. (4) The city had the right to bring this suit in its own name. Springfield v. Railway, 69 Mo. App. 514; 14 Am. and Eng. Ency. of Pleading and Practice, p. 1137. (5) The evidence in this case shows that respondent had permitted its property to become a nuisance upon the streets and hanging over sidewalks in the city of Carthage. The Central Law Journal, Jan. 17, 1890, p. 49. (6) There is no evidence of an assignment of the

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franchises to the Carthage Light Company, nor could there be a valid assignment for the reason that there was no express law under the general statutes by which the electric light company could assign their franchise. 4 Amer. Corporation Cases, page 203; Moore on Corp., secs. 924-930-934; 1 Burch on Private Cor., secs. 362-389; Thompson on Corp., secs. 5355-5373-5374; Stewart v. Jones, 41 Mo. 141; 4 Amer. and Eng. Ency. Law, (1 Ed.), page 238.

John A. Eaton and *Howard Gray* for respondent.

SMITH, P. J.—The plaintiff is a city of the third class and the defendant is a business corporation organized in 1897 under the provisions of article 9, chapter 12, Revised Statutes 1889. The plaintiff was organized under the Act of March 15, 1873 (Sess. Acts 1873, p. 221), and the amendatory Act of February 27, 1875, and continued to thus exist until 1890 when it became and ever since has remained a city of the third class under the statute (Sess. Acts 1893, p. 65).

In 1885 the plaintiff by ordinance granted the Sperry Electric Light and Power Company and its assigns permission to erect, maintain and operate electric light works and to transmit power by means of poles and wires for a period of twenty years. In 1894 the plaintiff by a further ordinance granted to F. H. Fitch and assigns the privilege to construct, maintain and operate over certain of its streets and alleys; an electric railway, and also the further permission to erect poles and wires for electric lighting purposes. It stands admitted by the pleadings that the plaintiff while it existed under its special charter (the said Act of 1875) the privilege was granted by it to the assignors of the defendant to use its streets and alleys for the erection of poles and the swinging of wires thereon, and that the defendant had succeeded to the ownership of the said privileges so granted to its assignors, and as such assignee was occupying said streets and alleys thereunder.

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There is no issue made by the pleadings as to the assignment and ownership of the privileges granted especially to Sperry and Fitch. And if there had been, the uncontradicted and unobjected-to evidence adduced by the defendant clearly established the affirmative of that issue. It is conceded that the plaintiff had at no time granted to the defendant *directly* the right to erect its poles or swing its wires in the streets and alleys of the former, so that if the defendant has any right to use and occupy the streets and alleys of the plaintiff with its poles and wires that right is derived exclusively through the grants made to one or both of its assignors. The question then is, did that right pass to the defendant's assignors or either of them under the ordinances to which we have alluded.

The Sperry privilege was granted in 1885 while the plaintiff was governed by the Charter Act of 1875, so that whether that act authorized the passage of the ordinance granting that privilege is one of the decisive questions we are required to determine. Sections 19 and 26 of article 5 of that act provides that the city council shall have the power by ordinance "*to provide the city with water and light*" and to provide for lighting the streets and erecting lamps thereon; and section 49 of the same article provides that the said council shall also have power to erect, maintain and operate waterworks or gasworks and to regulate the same; to acquire grounds on which to erect such works, etc.; "*provided* (1) the mayor and council may in their discretion grant the right to any person or persons to erect waterworks or gasworks and lay down pipes, mains, etc., for the use of the city and its inhabitants as the council may by ordinance *prescribe; provided* (2) that such right shall not be granted for a longer time than thirty years and shall not be granted unless *the consent* of a majority of the qualified voters of the city voting at an election for that purpose shall so determine."

These three sections of the act are in *pari materia* and must be treated as if one section and that construc-

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tion adopted that will give effect to all of them. St. Louis v. Howard, 119 Mo. 41; Andrew County v. Schell, 135 Mo. 31. The first of these confers upon the plaintiff the power to provide light and to erect lamps for that purpose on the streets, and the other authorizes this utility to be provided in one of two ways: that is to say, either by erecting, maintaining and operating gasworks itself, or by granting the right to some other person to do so. The latter section was intended to qualify the exercise of the power conferred by the first two, or, in other words, while the power to light was conferred, the only kind of a plant that was authorized to be constructed for the production of such light was a gas plant. There was no authority given for the construction of an electric plant or to transmit electric power by means of poles and wires placed in the streets and alleys of the city. We may take notice of the fact that in 1875 when the said act was passed, among the possibilities of electricity, that of using it as an illuminator to the extent of lighting a city by means of it, was not one of those contemplated by the Legislature. There are no terms employed in the act which authorized the passage of an ordinance to erect an electric plant or to occupy the streets and alleys with the poles and wires used by it for the transmission of power, etc. The grant of legislative powers to municipalities is to be strictly construed, and if there be a reasonable doubt of the existence of a power it will be held not to have been granted. Knapp v. Kansas City, 48 Mo. App. 485; Kansas City v. Lorber, 64 Mo. App. 608; Waterworks v. Kansas City, 20 Mo. App. 237; St. Louis v. Telephone Co., 96 Mo. 626. It can be safely asserted as a fact that the lighting of the plaintiff city by electricity was not one of the things the Legislature had in mind or intended to authorize or accomplish by the passage of the act.

But if this construction is considered too narrow, and if the contention be upheld that the power to erect an electric plant or to confer that power upon one or more persons is implied in the terms of the act, still the

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exercise of that power is denied by the terms of the second proviso of the act already quoted, unless the consent of the majority of the qualified voters was first obtained, and of this there is no pretense. The proviso just referred to operates as a limitation only on the exercise of the power conferred by the terms of the first proviso. So that, no difference what construction of the act in its entirety may be adopted, it is clear that the ordinance in question was unauthorized by the act and gave to the grantee therein named or its successor no authority to occupy the plaintiff's streets and alleys with its poles and wires for any purpose.

Turning to the other question, that is to say, whether or not the passage of the said ordinance relating to the grant to Fitch and assigns was an authorized exercise of its charter power, it is to be observed that this ordinance was passed in 1894, after the plaintiff had become a city of the third class under the statute. So that the question is to be determined by reference to the Act of April 19, 1893 (Sess. Acts 1893, p. 85). By section 95 of that act the council were authorized to provide for the lighting of streets and the erection of lampposts, poles and lights therefor, and to make contracts with any person for lighting the streets with gas, electricity or otherwise, provided (1) that no contract should be for a longer period than ten years and provided (2) that no such contract should obtain any validity until ratified by a two-thirds majority of the qualified voters, etc. The section further provides that the council should have the right to erect and operate gasworks, electric light works or works of any other kind or name, and to erect lampposts, electric wire poles or any other apparatus or appliances necessary to light the streets, alleys, etc.; and in the third *proviso* of the section the council are authorized to grant the right to any person to erect such works, lay the pipe, wires and erect the posts, poles, etc., therefor, and in the fourth proviso of the section it is further provided that such right to any such person shall not extend for a longer period than thirty years, nor be

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granted or renewed without the consent of a majority of the qualified voters, etc.

The second and fourth proviso above referred to render a concession by the council, like that to Fitch, nugatory unless consented to by the qualified voters of the city. No such consent to the Fitch concession was ever obtained. While the ordinance in so far as it is intended to furnish authority to Fitch and his assigns to erect upon the streets and alleys poles and wires for the transmission of electricity for heating, lighting and power purposes is invalid and inefficacious, except that it is sufficient to authorize Fitch and his assigns as a part of the equipment of said street railway provided for in other sections of the ordinance, to erect and maintain poles and wires in the streets and alleys of the city incidental to and in connection with the operation of the said street railway, but such right can not be disconnected with the operation of said street railway and transferred to one who does not own the said street railway franchise nor operate the same under it. This ordinance not having been consented to by the qualified voters of the city, as required by the statute, which was the charter of plaintiff, was without legal validity in so far as it authorized the grantee therein to erect posts and wires in the streets of the city to light the same; and to that extent the right conferred by it was not the subject of transfer and, therefore, defendant can base no right on that ordinance.

Some reference is made in briefs of counsel to Waterworks v. Webb City, 78 Mo. App. 422, but that case is not in point here. The city was not there as here restricted in the exercise of the power, that was in question, to a particular mode. Where such a restriction in a charter power exists, that power can not be exercised in a manner that is inconsistent with such restrictions. It seems quite clear to us that the power conferred on the plaintiff city by said several legislative enactments was exercised in a manner inconsistent with the restrictions therein imposed and, therefore, they are invalid and did not confer upon the grantees therein

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named nor the defendant, their assignee, the rights claimed by the latter.

Defendant finally argues that even if the poles and wires of defendant were a continuing public nuisance, the plaintiff by reason of its long acquiescence therein is estopped to claim injunctive relief. One of the difficulties about this contention is that no estoppel or acquiescence was pleaded or relied on in the trial, and, hence, there is no issue of that kind before us for consideration. In no case wherein pleadings are required can an estoppel *in pais* be made available unless it is pleaded. Railway v. Curtis, 154 Mo. l. c. 20; Avery v. Railway, 113 Mo. l. c. 568; Hammerslough v. Cheatham, 84 Mo. l. c. 21; Noble v. Blount, 77 Mo. l. c. 242; Ferneau v. Whitford, 39 Mo. App. l. c. 316; Webb v. Allington, 27 Mo. App. l. c. 571.

Accordingly, we shall reverse the decree and remand the cause. All concur.

R. L. GIBSON & BROTHER, Plaintiffs and Appellants, v. M. R. JENKINS, Defendant and Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Account**: CONTINUOUS OPEN: LIMITATIONS. If it is fairly inferable from the conduct of the party that the whole account was to be regarded as one, as in the case of merchants' accounts against customers, none of the items are barred by the statute of limitation unless they all are.

2. **Referees**: FILING EXCEPTIONS TO REPORT: TIME OF. Exceptions to the report of a referee are required by the statute to be filed within four days after the filing of the report, and this means four term days. So where the referee's report was filed on the last day of the term, the parties would have until the fourth day of the next term to file exceptions.

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3. ———: REPORT OF: EXCEPTIONS: POWERS OF COURT: APPELLATE PRACTICE. Where a case is one for compulsory reference, the court can reject the report of the referee and make its own findings, and the exceptions in the appellate court must be to the action of the court and not to the report.

4. **Pleading:** GENERAL DENIAL: EVIDENCE: INSTRUCTION. Under a general denial, the defendant may prove any fact which goes to show that the plaintiff never had any cause of action, and if inadmissible evidence is admitted without objection, the plaintiff can not object to instructions submitting issues so raised.

5. **Contracts:** IMMORAL: PLEADING: EVIDENCE. Where the pleading alleges a contract and the answer is a general denial and the contract itself shows no illegality on its face, the court can not consider an unpleaded defense even though it develop in the evidence.

6. **Trial Practice:** DIFFERENT COUNTS: ONE JUDGMENT. A petition for an accounting contained two counts. The court made a separate finding on each count and then entered one general judgment. *Held*, harmless in this cause, however hurtful it may be in other cases.

7. **Accounting:** INTEREST: HARMLESS ERROR. In an accounting, where there are mutual accounts on each side, an error, if any, in failing to allow the parties interest, is harmless, especially where the complaining party has a judgment rendered against him.

ON REHEARING.

8. **Contracts:** IMMORAL: PLEADING: EVIDENCE. Where the petition counts on a contract fair on its face and the answer is a general denial, and evidence tending to establish a defense that is *new matter* is without objection admitted, there is no waiver of the failure to plead the new matter. Such waiver occurs only where the unpleaded defense developed by the admitted testimony is not new matter. (Cases considered.)

Appeal from Linn Circuit Court.—*Hon. John P. Butler,* Judge.

REMANDED *(with directions).*

A. W. Mullins and *Harry K. West* for plaintiffs.

(1) The court erred in granting defendant thirty days within which to file his exceptions to the report of the referee. R. S. 1899, sec. 714. Maloney v. Rail-

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road, 122 Mo. 106. It is not contended that the court may not, on its own motion, set aside a referee's report without the filing of any exceptions. But the action of the court in this case is not based upon its own motion but upon defendant's exceptions. Defendant's exceptions were filed out of time and in vacation and therefore formed no basis for the court's action. Moreover, the statute contemplates that the exceptions, if any, shall be speedily determined. To permit the trial court to grant one of the parties thirty days within which to file exceptions; to allow such exceptions to be filed in vacation, and to continue the case to another term so that the exceptions may be thus filed in disregard of the statute, is the exercise of arbitrary power which can not be approved. (2) The court erred in holding that plaintiffs' account, including the weighing, was not a running account. Ring v. Jamison, 66 Mo. 424; Chadwick v. Chadwick, 115 Mo. 581; Nedvidek v. Meyer, 46 Mo. 600; Ittner v. Association, 97 Mo. 567; McWilliams v. Allen, 45 Mo. 573. (3) The rule is now firmly established in this State that when there is nothing on the face of the petition or on the face of the contract sued upon which indicates that the contract sued upon is illegal or immoral, the facts constituting the illegality or immorality constitute an affirmative defense which must be pleaded. St. Louis A. and M. Ass'n v. Delano, 108 Mo. 217; McDearmott v. Sedgwick, 140 Mo. 172; Musser v. Adler, 86 Mo. 445; Moore v. Ringo, 82 Mo. 468; Sybert v. Jones, 19 Mo. 86; George v. Williams, 58 Mo. App. 138.

Wilson & Clapp for defendant.

(1) No court will lend its aid to one who founds his cause of action upon an immoral or illegal act. Hamilton v. Scull, 25 Mo. 165; Sumner v. Summers, 54 Mo. 340; Kitchen v. Greenabaum, 61 Mo. 110; Atlee v. Fink, 75 Mo. 100; Attaway v. Bank, 93 Mo. 485; Sprague v. Rooney, 104 Mo. 360; McDearmott v. Sedgwick, 140 Mo. 172; Haggerty v. Manufacturing Co., 143

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Mo. 238; Tyler v. Larimore, 19 Mo. App. 445; Suits v. Taylor, 20 Mo. App. 166; Parson v. Randolph, 21 Mo. App. 353; Carter v. Shotwell, 42 Mo. App. 663; Board of Trade v. Brady, 78 Mo. App. 585. (2) That the contract sued on was immoral and illegal is disclosed by the testimony of R. L. Gibson. (3) Where evidence is admitted without objection, as if competent under a general denial, or as if specially pleaded, the defendant should not be prejudiced by the fact that the evidence was not competent under a general denial, or that it had not been specially pleaded. Stewart v. Goodrich, 9 Mo. App. 125; Carter v. Shotwell, 42 Mo. App. 663; Madison v. Railway, 60 Mo. App. 608. (4) This case involved the examination of long accounts on both sides. The court might lawfully direct a compulsory reference. Sec. 698, R. S. 1899; Wentzville Tobacco Co. v. Walker, 123 Mo. 662; Edwardson v. Garnhart, 56 Mo. 81; Smith v. Haley, 41 Mo. App. 611; Ice Co. v. Tamm, 138 Mo. 385; Francisco v. Rowland, 14 Mo. App. 600; Johnson v. Blell, 61 Mo. App. 37; Raines v. Lumpee, 80 Mo. App. 203. (5) Where the court may lawfully direct a compulsory reference it may act upon the evidence reported by the referee and find therefrom different conclusions of fact. Tobacco Co. v. Walker, 123 Mo. 662; Walker v. Hurlstone, 92 Mo. 327; Hardware Co. v. Walter, 91 Mo. 484; Bond v. Finley, 74 Mo. App. 22; Raines v. Lumpee, 80 Mo. App. 203; Johnson v. Ewald, 82 Mo. App. 276; Utley v. Hill, 155 Mo. 232. (6) In cases of compulsory reference the appellate court has the same power to review the findings of fact made by the referee or the court upon the evidence that it has in equity cases. Cahill v. McCornish, 74 Mo. App. 609; Raines v. Lumpee, 80 Mo. App. 203; Johnson v. Ewald, 82 Mo. App. 276; Small v. Hatch, 151 Mo. 300; Williams v. Railway, 153 Mo. 487. (7) It is immaterial whether the exceptions of defendant to the referee's report were filed in time or not. This being a compulsory reference case the report of the referee was advisory only, and the circuit court had the right of its own motion to change,

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modify and correct the findings of the referee. Smith v. Paris, 70 Mo. 615. (8) The defendant had four days in term after the report was filed in which to file his exceptions to the report. The report being filed on the last day of the August adjourned term, the defendant had the first four days of the next term in which to file his exceptions. Sec. 714, R. S. 1899. (9) Where a petition contains two causes of action, and the answer two or more separate counterclaims, a general judgment for the plaintiff is erroneous, and is ground for motion in arrest. McHoney v. Ins. Co., 44 Mo. App. 426; Com. Co. v. Railroad, 80 Mo. App. 164; Club v. Findlay, 53 Mo. App. 256.

BROADDUS, J.—The plaintiffs sue as partners. The original petition was filed May 5, 1898. The amended petition on which the cause was tried was filed at the December term of said court for the same year. The cause was referred to a referee whose finding was duly reported to the court, to which exceptions were filed by both parties. To the action of the court upon said report and the judgment in the case both parties have appealed, filing a joint abstract of the case. Both petition and answer are quite lengthy and to each is attached a long account. Many questions have been raised which we will endeavor to examine.

Plaintiffs' amended petition is to the effect that at divers dates, beginning on the second day of October and ending on the first day of January, 1894, they sold to defendant goods and merchandise and did weighing on their scales for him in value to the amount of $437.22; that about October 5, 1892, they presented this account, except what accrued afterwards, to the defendant for payment, said account amounting at that time to $419.32; that owing to the fact that both plaintiff and defendant were embarrassed financially, caused by losses sustained by the burning of their property at Browning, Missouri, on April 27, 1892, it was agreed between them that plaintiff should borrow $225 from the Browning Savings Bank and that defendant would

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sign the note to secure the loan of the bank, as security, which he would ultimately pay, and which, when paid by him, was to be applied as a credit upon plaintiffs' said account; that such note was given and after having been renewed was finally paid by defendant on the eighth day of February, 1898, at which time, with accumulated interest, it amounted to $277.25; and that defendant is entitled to the credit of the amount so paid on said account.

The second count is substantially as follows: That on April 27, 1892, plaintiffs owned at Browning, Missouri, goods, wares, lumber and implements to the amount in value of $21,500 which was set fire to and destroyed by Alva C. Ross at the instigation of one William P. Taylor; that defendant owned property of the value of $1,500 which was also destroyed at the same time by the same agency; that plaintiffs and defendant, on or about October 10, 1892, entered into an agreement by the terms of which plaintiffs were to institute an action by attachment against said William P. Taylor to recover judgment for the loss they had sustained by said fire and that in such action plaintiffs would bear one-half of the costs and expenses incurred and the defendant would bear the other half of the same; that the proceeds of the litigation were to be divided equally between plaintiffs and defendant; that the suit was instituted and proper judgment obtained against said Taylor for $15,000; that execution upon said judgment was issued and levied upon certain real estate of said Taylor which was sold and bid in by defendant to be held in trust for plaintiffs and himself in pursuance of said agreement; that defendant has sold said land and realized therefrom the sum of $2,250 and has collected by way of rent on said property $241, making the total amount received by defendant under said agreement the sum of $2,491, one-half of which belonged to plaintiffs; that the defendant has paid out for costs and expenses in said suit the sum of $967.88, while the plaintiffs have paid out in the same behalf $370.70, making defendant's expenses exceed plaintiffs'

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in the sum of $597, which deducted from said amount recovered as aforesaid leaves a balance of $1,893.90, of which one-half is due from defendant to the plaintiffs.

A summary of the defendant's answer, relevant to the matter in dispute, is about as follows: A general denial, and allegations that it is not true that he entered into the agreement to borrow the $225 from the Browning bank, as stated by plaintiffs; that at that time he was not indebted to plaintiffs but that, on the contrary, they were indebted to him; that at the time of said fire plaintiffs owed the German-American Bank, of Fort Madison, with accrued interest, $285 on a note which was payable to himself and which had been indorsed by him to said bank; that plaintiffs failing to pay said bank, it sued both plaintiffs and defendant and that the former having money enough to pay a part only on said note borrowed $225 from the Browning bank to pay the remainder, giving the $225 note mentioned in plaintiffs' petition with this defendant as security; and that said note was renewed and afterwards paid by defendant, at which time it amounted with accrued interest to $277.55. Defendant then further alleges that the claim in plaintiffs' account of date December 23, 1893, for $3 for pipe-tongs, is fictitious, and that the claim dated July 17, 1893, for $10 for Champion Steel cart was not sold and delivered to him but to the Jenkins Hayrake and Stacker Company. He claims next, by way of set-off, a note dated January 16, 1890, for $170 due in twelve months with interest from maturity, which was signed by one of the plaintiffs but which is averred to be the debt of both. He also sets up an account stated, of date the fourteenth day of March, 1892, for $170.90. There is another allegation in defendant's said answer setting up a counterclaim against plaintiffs, but as it was disallowed and no error assigned in that regard, it will not be inserted here.

The referee found as follows: That the items of merchandise charged to defendant in plaintiffs' petition

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commencing October 2, 1890, and ending January 1, 1894, is sustained by the evidence, except item for Champion Steel cart of date July 17, 1893, and $3 for pipe-tongs dated December 23, 1893. Second, that defendant realized from property acquired in the litigation against Wm. P. Taylor the sum of $2,250. Third, that the $170 note set up by defendant was the individual note of R. L. Gibson, and it was not allowed. Fourth, that the note set out in the petition and alleged to be the note of defendant was the note of the plaintiffs and that they be charged with it. Fifth, that the $50 order was due from plaintiffs to defendant and the latter was given credit for the same. Sixth, that under the evidence the claim of defendant for money loaned to and paid out for the Jenkins Hayrake and Stacker Company was not a matter for adjudication in the case and he so reported. He also found that defendant collected rents on the Taylor property in the sum of $182.75; and that the $170.96 set out in defendant's answer is due defendant and credits defendant with it.

The court overruled the exceptions to the report of the referee, set the same aside, examined the evidence, and made an independent and different finding. In this finding by the court all plaintiffs' accounts except that for weighing were disallowed. The court gave the following reason for its finding and ruling: "The court further finds that plaintiffs' accounts for lumber and other articles sold and delivered to defendant by plaintiffs between the second day of October, 1890, and the fifth day of May, 1892, amounting to $418.62, and the weighing account beginning on the twenty-seventh day of December, 1892, and ending on July 1, 1894, amounting to the sum of $5.60, did not arise out of the same contract express or implied, and that the latter did not attach to and become a part of the lumber account so as to save the bar of the statute of limitations."

The evidence was to the effect that the plaintiffs were engaged in the lumber business and were also engaged at the same time and place in weighing for customers; that when the fire occurred in 1892, de-

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stroying plaintiffs' property, they discontinued the lumber business; that the lumber account terminated in May, and the weighing account began in December, 1892, and continued until January 1, 1894.

We can not agree with the learned judge who tried the cause that the item in the account for weighing did not attach to the other part of the account including the items for lumber because they did not arise out of the same contract express or implied. In our opinion, that is not the proper test. The different articles in the account may have been obtained under separate contracts. A customer buys from his merchant a certain article one day and at a given price, and on the next day he purchases another and different article or, perhaps, the same article at another and different agreed price. The purchase of one day would not be under the contract of the purchase for the other day, yet it would not do to say that they were not a part of the same running account. Had the weighing account commenced the very next day after the appearance of the last item in the account for lumber and other articles, could it be said that the two did not constitute one account in the contemplation of the parties? The whole made up one unsettled demand upon which the plaintiffs had one cause of action only. The fact alone that there was a difference of six months time between the last item in the one and the first item in the beginning of the other, can make no difference in the matter. The facts of the case show that the parties to the suit occupied the most confidential relations to each other. In October, 1892, the agreement was entered into for the plaintiffs to bring the suit against William P. Taylor for destroying their property by fire. The suit was to be for the benefit of both parties, out of which were to grow mutual accounts for costs and expenditures which, of course, were to be kept by each party. These mutual accounts began between the date of the last item in the so-called lumber account and the date of the first item in the weighing account. The most reasonable inference to be gathered from this and other circumstances

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is that the relation of debtor and creditor should continue to be evidenced by a continuous open account. Where "it is fairly inferable from the conduct of the parties, while the account was accruing, that the whole was to be regarded as one, as in case of a merchant's account against a customer, none of the items are barred by the statute unless all are." Ring v. Jamison Co., 66 Mo. 428; Chadwick v. Chadwick, 115 Mo. 581.

An account is nothing more than a statement showing the debits and credits existing between two or more persons. Anything that constitutes a debit or credit is properly a part of the account. The merchant while his business in the main is to sell his customers merchandise, may also loan him money, may hire him a horse, may lease him a house, go on a voyage to look after his business, or pay his note at his request, for all which he may charge him in the same account for goods sold and delivered. That part of plaintiffs' account held to have been barred by the statute was practically admitted, with the exception of two items, and the weighing account was proved, and the former should not have been disallowed under a strained construction of the law.

But plaintiffs contend that defendant's exceptions to the referee's report were not filed in time and therefore can not be considered. This is a misapprehension. The statute provides that exceptions to the reports of referees shall be filed within four term days. The report here was filed on the day of adjournment of the court, at which time defendant was given thirty days to file his exceptions. He filed them in vacation and before the first day of the next term of court, and within the thirty days. Under the statute he would have had time to have filed them during the fourth day of said coming term. The plaintiffs cite several cases to support their position, among them being Rienecke v. Jod, 56 Mo. 386. In that case the report of the referee was filed on the seventeenth day of October, 1871, and the defendant filed his exceptions on the eleventh day of November, next thereafter. The court held that they

were not filed in time as the law required them to be filed within four days in term after the report was filed. In Gaston v. Kellog the language of the court is that "the bill of exceptions does not show that the exceptions were filed within four days after the report of the referee was filed." This, however, is somewhat misleading, as the opinion does not show whether the time was four term days or otherwise. But we must presume that the court meant four term days, inasmuch as the decision is predicated upon that of Rienecke v. Jod, supra.

In Maloney v. Railroad, 122 Mo. 106, the court was passing on a motion for new trial and in arrest of judgment. The statute regulating the filing of such motion is substantially different from the one under consideration and has no application here. However that may be, it was a case for compulsory reference and the court had the right to reject the report of the referee, as it did, and to make its own finding. Therefore, the exceptions must be to the action of the court and not to the report of the referee that we are to consider. Williams v. Railway, 153 Mo. 487; Small v. Hatch, 151 Mo. 300; Rains v. Lumpee, 80 Mo. App. 203.

The defendant contends that the contract sued on is immoral and illegal as disclosed by the testimony and that therefore the court was not authorized to enforce it. As a general proposition, this is true. The evidence discloses the fact that the plaintiffs were insolvent at the time the agreement was entered into between the parties by which the defendant was to take the deed to the property bid in at the execution sale in the name of the defendant to be by him held in trust for the one-half interest and for the use and benefit of the plaintiffs. Under the statute this was void as against creditors. The illegality of the contract was not pleaded specifically in the answer, but it is claimed that its illegality was put in issue by a general denial. In a suit on a contract made in violation of the statute against letting premises for bawdy-house purposes it was held under a general denial of the answer that parol

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evidence was admissible to show the purposes for which the premises were let. Sprague v. Rooney, 104 Mo. 349. Whether evidence that an agreement was made in fraud of creditors is admissible when the petition alleges the agreement and seeks the enforcement thereof and the answer is a general denial, was a query put by the judge who rendered the opinion of the court in Carter v. Shotwell, 42 Mo. App. 663. However, the court held that the better rule is, when fraud is relied on as a defense then it should be pleaded specifically. It was also held by the court that as evidence challenging the good faith of the transaction was admitted without objection, that instructions offered making fraud an issue ought to have been given. Under a general denial the defendant may prove any fact which goes to show that the plaintiff never had any cause of action, and if plaintiff without objection permits defendant's evidence, inadmissible under the pleadings, he can not object to an instruction submitting the issue so raised to the jury. Madison v. Railway, 60 Mo. App. 600.

But it appears that the plaintiffs did object to the introduction of evidence impeaching the contract in question as fraudulent against creditors, but their objection was overruled by the referees, consequently they are not concluded on the ground that they waived their rights in that respect. In the case of St. Louis Agricultural Ass'n v. Delano, 108 Mo. 217, we find a ruling in conflict with that laid down in Sprague v. Rooney, supra. In speaking of the pleadings therein Judge Sherwood said:

"There is nothing in the face of the petition herein which indicates any other than a valid contract between the plaintiff and the defendants, and when this is the case the rule is that if the contract is to be invalidated by reason of some extrinsic matter, such matter must be pleaded in order that it be made issuable at the trial so that it may be considered on appeal. In this case the answer was simply a general denial and on this point the following authorities apply." He then

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cites: Sybert v. Jones, 19 Mo. 86; Moore v. Ringo, 82 Mo. 468; Musser v. Adler, 86 Mo. 445; Cummeskey v. Williams, 20 Mo. App. 606. Not content with what he had already said, and the authorities he had cited to sustain himself, he finishes by saying: "Nor will any appellate court consider an unpleaded defense." In McDearmott v. Sedgwick, 140 Mo. 172, the case of Sprague v. Rooney, supra, was overruled as being in conflict with the weight of authority in this State; the rule laid down in St. Louis Ass'n v. Delano, supra, is approved; and attention is called to the distinction made by the court in Musser v. Adler, supra, between a case where the illegality or immorality of the contract appears on the face of the contract and where it does not. In the former instance the petition will be denied where it is based on such a contract; in the latter instance the defense should be clearly and distinctly stated.

From the foregoing it will be seen that the rule seems to be well settled that where a pleading is supported by a contract fair on its face, in order to challenge its legality the facts must be specifically pleaded.

The defendant further contends that the judgment should be reversed because there is one general judgment and not a separate judgment on each count. An examination of the judgment of the court will disclose that it made a separate finding on each item and then entered up a general judgment including all its findings. We can not see how the defendant could be prejudiced thereby, if it was error so to do, which we do not believe. There may be cases in which there should be separate findings and judgments on the different counts, so that the party defeated may not be prejudiced and that he may take the necessary course to correct that which he may deem hurtful and not be compelled to appeal from the whole case. This, however, is a case of accounting and it can make no difference whether there be a judgment on each count or one judgment for the whole, for the sum of both represent the difference between plaintiffs' and defendant's accounts, which was the object of the suit.

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The further objection that the court committed error in not allowing defendant interest on the items of his account is not well taken. The court failed to give either party interest on the credits established; and as the plaintiffs obtained judgment we can not see how the defendant can complain inasmuch as if interest had been allowed to both the plaintiffs and the defendant the plaintiffs' judgment would have been greater than it is. And as the plaintiffs have not complained of this action of the court the judgment will not be disturbed for that reason.

We believe we have noticed all material errors.

The cause is affirmed against the defendant on his appeal and reversed on the appeal of the plaintiffs. The trial court is directed to set aside its former judgment and to enter up judgment for the plaintiffs, in addition to the sum of $271.47½ cents found due by the previous judgment, the further sum of $417.35, the amount of their lumber account, making a total of $688.82½ cents, with six per cent interest from the fifth day of May, 1898, until the date of rendition. All concur.

ON REHEARING.

SMITH, P. J.—After the foregoing opinion was delivered, a rehearing of the case was granted, but a reargument and re-examination of it has not influenced a conviction in my mind that I should recede from the conclusion announced in that opinion.

It has been seen from a synopsis of the second count of the petition contained in said opinion that it it therein alleged that the plaintiffs and defendant entered into an agreement which was to the effect that the defendant would at the sale under the execution issued on the judgment against Taylor, bid in the land levied on and hold the title so acquired for the use and benefit of both plaintiffs and himself; and that if the latter sold the land he would divide the net proceeds arising therefrom—or, if not so sold then that the land

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so acquired should be equally divided between them; that in pursuance of such agreements the said lands were bid in by defendant and subsequently sold by him whereby he realized a large sum of money which was subject to division and distribution between the parties to such agreement. The defendant answered this count by a general denial.

At the trial the plaintiff, M. R. Gibson, was called as a witness in behalf of the plaintiffs and testified to the facts alleged in the said count of their petition. By his testimony the plaintiffs established a prima facie right to recover on their said second count. It is however true that after such prima facie case had been made out by his testimony in chief, that on cross-examination by the defendant he testified without the interposition of any objection thereto by the plaintiffs, that the latter at the time of their entering into said agreement with defendant were insolvent and indebted to Schrock in about three thousand dollars and that the title to the land so acquired by defendant was, as to plaintiffs' interest, vested in the defendant for the purpose of hindering and defrauding the said Schrock in the collection of his said debt. Testimony of the said witness was full and explicit as to the fraud and was received without objection.

After such testimony had been received as has been stated and near the close of such cross-examination the said witness was asked by defendant if he had not entered into said agreement with defendant to put the property that was to be bought in such shape that said Schrock could not reach it. To this question the plaintiffs objected on the ground that it was immaterial. This objection was by the court overruled and the witness was permitted to answer. No motion was made to strike from the record the testimony of the witness as to the fraudulent purpose of the agreement, nor did the objection made extend to it. There was no objection to the reception of such testimony or to any part of it that it was incompetent or inadmissible under the answer. Had the objection been sustained the case

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here would not have been different, as abundant unquestioned testimony proving the fraud would have remained.

The question thus presented is whether or not the unobjected-to testimony disclosing the fraudulent purpose of the plaintiffs should have, in view of the state of the pleadings, been given any consideration by the trial court. The rule has been declared to be that when either party to a contract or transaction applies to a court for aid, if the plaintiff can not open his case without showing he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. Hatch v. Hanson, 46 Mo. App. loc. cit. 329 and authorities there cited. The principle of public policy is *ex dolo malo non oritur actio.* No court will lend its aid to one who founds his cause of action upon an immoral or illegal act. Attaway v. Bank, 93 Mo. 485; Atlee v. Fink, 75 Mo. 102.

And so the rule may be said to be firmly established in this State to the effect that where there is nothing on the face of the petition or in that of the contract sued on which indicates that it—the contract—be illegal or immoral, the facts constituting the illegality or immorality to be available must be pleaded as an affirmative defense. Sybert v. Jones, 19 Mo. 86; Moore v. Ringo, 82 Mo. 468; Musser v. Adler, 86 Mo. 445; McDearmott v. Sedgwick, 140 Mo. 172; St. Louis Assn. v. Delano, 108 Mo. 217; Reese v. Garth, 36 Mo. App. 641; George & Lowe v. Williams, 58 Mo. App. 139; Schwartz Bros. Com. Co. v. Vanstone, 62 Mo. App. 241. If the defendant untruly denied the making of the agreement alleged in the second count of the plaintiffs' petition, that should not enable him to avail himself of the accidental fact of the illegality appearing in the testimony. It has been ruled here and elsewhere that an affirmative defense is of no avail if not pleaded, though the testimony disclose it. Schwartz v. Vanstone, supra; Reese v. Garth, supra; McDearmott v. Sedgwick, supra; Dinglidein v. Railroad, 9 Bosw. (N. Y.) 79. Or, as said in Musser v. Adler,

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supra: "It is not enough that evidence may appear tending to establish facts which if pleaded would defeat a recovery."

It must be considered that the agreement alleged in said count of the petition was in every respect legal and valid. There is nothing on its face indicating any other than a valid and binding agreement between the parties thereto. If the defendant had desired to invalidate the agreement on the ground that it was entered into by the plaintiffs to hinder and defraud their creditors, instead of resting his defense on a mere denial of the allegations of the said count, he should have specially pleaded such extrinsic matter so that it could have been made issuable at the trial and later on considered on appeal. It follows, therefore, that the testimony of the plaintiff which on cross-examination disclosed that the agreement pleaded was entered into by the plaintiffs to hinder and defraud their creditors, was not available as a defense to the defendant under his answer and was and is entitled to no consideration.

But it is contended by the defendant that as the plaintiffs made no objection to the testimony disclosing the fraudulent purpose with which they entered into the agreement, that therefore such testimony should have been considered though the answer was but a general denial.

As I understand it, in cases like the present, where the evidence elicited by defendant and received on the trial without objection tends to establish a defense that is *new matter,* the plaintiffs by their failure to object to such testimony do not thereby waive the question of pleading, and render such testimony competent under the general denial as if specially pleaded by the answer. The rule in respect to waiver of the question of pleading is limited in its operation to these cases where the unobjected-to testimony tends to establish an unpleaded defense which is not new matter. There is nothing in Stewart v. Goodrich, 9 Mo. App. 125; Carter v. Shotwell, 42 Mo. App. 663 and Madison v. Rail-

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way, 60 Mo. App. 608, that decides anything to the contrary.

If, however, these cases should be considered as holding that a plaintiff in a case like the present, where the unobjected-to testimony received establishes an un-unpleaded defense that is new matter, waives the question of pleading and thereby renders such testimony under a general denial as competent as if such new matter had been specially pleaded, then it is clear that such cases to that extent are out of harmony with Sybert v. Jones, supra, and the other cases following it which have been already cited.

I therefore conclude that the affirmative defense of fraud, which the unobjected-to testimony tended to establish, is not, under the general denial contained in the answer, entitled to any consideration in the determination of the issues arising in the case, and for that reason I concur in the result reached in the opinion referred to at the outset. *Broaddus* and *Ellison, JJ.*, concur.

H. H. GREGG, Appellant, v. ROARING SPRINGS LAND & MINING COMPANY, Respondent.

Kansas City Court of Appeals, December 1, 1902.

1. **Trial Practice:** INSTRUCTIONS: MODIFICATION OF: INVITED ERROR. Where the court modifies an instruction to harmonize with the theory of other instructions asked by the same party, such party invites the error and can not complain.

2. **Contracts:** ACCEPTANCE OF CHECK: INSTRUCTION. Where a party accepts, indorses and cashes a check containing certain recitals as to its application, the check become prima facie evidence of the payment and its purpose, and an instruction to that effect and placing the burden of proof on the payee to show that the payment was not as recited in the check, is approved.

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3. **Tenants in Common:** ACCOUNTING: CONTRACT: INSTRUCTION. Where a tenant in common sues his co-tenant for an accounting for rents and profits received, matters of contract between the parties are immaterial, and an instruction referring to a contract and its breach is properly refused.

4. ——: ———: EXCLUSION: INSTRUCTION. A tenant who has been excluded by his co-tenant can recover his proper share of the rental value of the property as well as for waste, but in an action for accounting for rents and profits received, such matters can not be injected by instruction.

5. ———: POSSESSION: MINING STATUTE. A tenant in common in possession by consent without limit of time is a tenant at will or from year to year, and the mining statute does not determine his relation.

6. ———: ACCOUNTING: ACCORD AND SATISFACTION: INSTRUCTION. Where in an action for an accounting by a co-tenant there is no answer of accord and satisfaction, it is improper to instruct on such theory.

7. ———: ———: CONTRACT: INSTRUCTION: EVIDENCE. An instruction should keep within the limits of the issues presented by the pleadings and also the evidence.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Sturgis & Geyer and *Geo. Hubbert* for plaintiff.

(1) The court erred in modifying and changing instruction No. 2a as asked by plaintiff and giving it as 2b. The instruction is based on section 8767, Revised Statutes 1899. The right to mine given by that section terminates in three years. The instruction as asked states in effect that the plaintiff had a right to terminate the arrangement at that time and if he did so, then the "former agreement was no longer binding." (2) Instruction No. 5 given for defendant is erroneous as a comment on the evidence. It singles out the one fact of the check marked "in full to date" and gives it undue prominence. Steinwender v. Creath, 44 Mo. App. 356; State v. Bell, 70 Mo. 633; State v.

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Elkins, 63 Mo. 159; State v. Smith, 53 Mo. 267; Chauquette v. Borada, 28 Mo. 491; State v. Sivils, 105 Mo. 530; State v. Seal, 47 Mo. App. 603; Miller v. Marks, 20 Mo. App. 369; 1 Jones Ev., p. 3; 1 Best Ev., 10, et seq.; Perry v. Railroad, 36 Iowa 106; 1 Jones Evidence, page 3. (3) Any writing offered as containing an admission against the opposite party, is always subject to contradiction or explanation, where the same calls for any explanation or contradiction. Duncan v. Matney, 29 Mo. 368; Wild v. B. & L. Ass'n, 60 Mo. App. 200. (4) In refusing to give instructions No. 8 and 11 the court in effect declined to submit to the jury at all the plaintiff's theory of the case. (5) The court erred in excluding the plaintiff's offer to testify as to the advantages contemplated and to have been gained by compliance with the condition of the respondent's alleged agreement to itself do the developing and mining work.

Galen & A. E. Spencer for respondent.

(1) The chief issue was the terms of the agreement under which defendant operated the land and paid royalty to plaintiff. (2) Plaintiff's instruction No. 2a was wrong until modified by the court, and given as No. 2b. It was also faulty in ignoring the defense pleaded. Link v. Westerman, 80 Mo. App. 592. (3) Defendant's No. 4 is but the converse of this as amended by the court. (4) By defendant's No. 5 the court correctly declared that the fact plaintiff accepted from defendant in July, 1899 (being the last payment) and indorsed and cashed defendant's check reciting on the face thereof that it was in payment of royalties from the land in full to date, was "evidence of payment to plaintiff, of royalties from said land to said date," and then advised the jury that the burden rested on plaintiff to show the contrary. Allamong v. Peoples, 75 Mo. App. 276; Beattie v. Hill, 60 Mo. 72; Thompson Charging the Jury, p. 71. A receipt is prima facie evidence of payment. 19 Am. and Eng. Ency. Law

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(1 Ed.), p. 1120; 19 Am. and Eng. Ency. Law (1 Ed.), p. 1128, and cases cited; Brauckman v. Leighton, 60 Mo. App. 38. (5) Plaintiff's No. 8 was properly refused. (6) Plaintiff's No. 9 is not based on any issue involved or evidence introduced in this case. (7) Plaintiff's No. 11 is so palpably erroneous as to make comment almost unnecessary.

SMITH, P. J.—The defendant is a corporation organized under article 9, chapter 12, Revised Statutes.

The plaintiff and defendant were owners as tenants in common of 160 acres of mineral land in Newton county, this State. The plaintiff's petition alleged that during the time of such co-tenancy the defendant caused said land "to be mined and operated by sub-tenants and licensees, for and during the times and years set out in his first count; and that, for the ores which were mined and taken and sold from said lands as set out in the first count and the annexed statement, all as aforesaid, the defendant has, from year to year and time to time, received as royalties and rent, from defendant's aforesaid subtenants and licensee operators and miners of said lands, fifteen per cent upon the values of the zinc ores mined, and twenty per cent upon the values of the lead ores mined, that is, for the years and to the amounts as set out in the above mentioned statement which is hereto annexed, all amounting to $27,739.48, of which $4,146.70 were due and payable to plaintiff yearly as received, and payment of the same has been demanded, but defendant paid only parts of the same, amounting to only $2,807.82, so that, defendant yet owes, and is indebted to plaintiff, on account of said collected royalty and rents, three-twentieths of twenty per cent on said lead ores and 15 per cent on said zinc ores, amounting to the sum of $1,338.88."

The answer was that, "about the time defendant acquired an interest in said land it was agreed with plaintiff that defendant should conduct mining operations thereon, and plaintiff should be paid and would accept in full settlement and payment of all claims

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and demands for ores and minerals produced therefrom, a royalty of three-twentieths of ten per cent of the value of all zinc ore, and three twentieths of fifteen per cent of the value of all lead ore mined and sold from said premises; that under and by virtue of said agreement defendant has conducted mining operations on said lands, and ores have been produced and sold therefrom, and defendant has paid plaintiff the full amount of said royalty on all said ores and minerals.''

The testimony of the plaintiff was that upon condition defendant put in certain mining machinery on the land and mined the same itself, that he would accept during defendant's exclusive occupancy a royalty of three-twentieths of ten per cent on all the zinc and fifteen per cent on all the lead thereon mined. The evidence of the defendant tends to show that the plaintiff made a parol lease of his moiety to it in consideration of the payment of the royalties already stated, and that there was no such condition in the lease agreement as that to which plaintiff testified. The evidence was quite conflicting.

The quantity of mineral taken from the land was agreed upon. And it was also agreed that the defendant had paid the plaintiff three-twentieths of ten per cent on all the zinc and fifteen per cent on all the lead mined on the land. It seems from the evidence that the defendant company itself did not operate the mines on the land, or, if so, not in recent years, but that it had placed various kinds of mining machinery thereon which was used by the miners to facilitate their operations in taking out mineral and milling the same. The evidence further shows that some years after the defendant had been in the exclusive occupancy of the land, that plaintiff complained twice or more that he was not receiving the amount of royalty to which he was entitled—or, in other words, that as the defendant was receiving from the miners a royalty of fifteen per cent on zinc and twenty per cent on lead, that he ought to have his three-twentieths share of such royalties instead of that which he had been receiving. Notwith-

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standing such protests, the defendant continued to pay and the plaintiff to receive the same per cent of royalties as was paid and received at the beginning of the arrangement. At the end of each month a statement was made in detail of the number of pounds of mineral produced, the price received, etc., which with a check, upon which there was a notation what it was for, was mailed or handed to plaintiff.

The plaintiff claimed that the defendant having ceased to operate the mine and having dismantled the machinery erected on the land, and having leased it to others who paid on the mineral the fifteen and twenty per cent royalty, that he was entitled to his three-twentieths of the same. The cause was submitted to a jury whose verdict was for defendant.

The contention of the plaintiff, who has appealed, is that the trial court erred in the giving and refusing of instructions. The plaintiff questions the correctness of the action of the court in modifying his second instruction, but upon an examination of it we find that the modification is but the repetition of an expression of the law as requested and given in his first, and if it was an error it was invited by him and of which he can not be heard to complain.

The defendant gave plaintiff for the last month it was in the exclusive possession of the land under the agreement a check for the royalties on the quantity of mineral produced for that month, which check recited on its face that it was in payment of royalties in full to date. This was accepted by the defendant without protest or objection of any kind. The court instructed the jury that the check so given and received was evidence of payment to plaintiff of royalties to date and that the burden of proof was on the plaintiff to show by the preponderance of the evidence that such payment was not so made and accepted. The check was prima facie evidence of the payment and of all the facts therein recited and when plaintiff indorsed and cashed it he made it with all its recitals his contract. Quat-

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trochi Bros. v. Bank, 89 Mo. App. 500; Penn v. Brashear, 65 Mo. App. 24; Riley v. Kershaw, 52 Mo. 224; Bigbee v. Coombs, 64 Mo. 529; Cole County v. Dallmeyer, 101 Mo. 57. It was of course open to explanation by parol. Griffith v. Creighton, 61 Mo. App. 1. This instruction was unexceptionable in enunciation.

The plaintiff further complains of the action of the court in refusing his eighth instruction which declared that "if the defendant undertook and agreed with plaintiff to carry on mining and pumping or drainage operations with its machinery on the land they owned between them, on consideration of which plaintiff agreed to accept less than what otherwise would have been his proportion of royalties received from mining licensees or tenant miners for ores mined from said land, and that the defendant company failed to so mine and drain the land as agreed, then the plaintiff was not bound by the agreement on his part, and he may lawfully claim and recover the full amount which he would otherwise have been entitled to as one of the owners and tenants in common with defendant." There is nothing in the plaintiff's petition justifying the submission of the case upon the theory of this instruction.

The action stated by the petition is that of one tenant in common against another for an accounting for the rents and profits received. Such an action could not be maintained at common law but this defect in it was remedied by the passage of the statute 4 and 5 Anne, chap. 16; Freeman on Co-tenants and Part., sec. 270; Ragan v. McCoy, 29 Mo. 356. And so it has been held that where one tenant in common *actually* receives the rent, issues and profits, then he may be compelled to account therefor. Freeman's Co-tenants and Part., sec. 273, and cases there cited.

This is not a case where one tenant has occupied the whole land and excluded his co-tenant from entering and enjoying the property. A tenant thus excluded would be entitled to recover his proper share of the rental value of the property as well as for waste without regard to the statute of Anne. Childs v. Railroad,

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117 Mo. 414. But it is nowhere pretended that the plaintiff was excluded by defendant from his enjoyment of the land, so that there is no case stated in the petition unless it be for an accounting for the rents and profits actually received. No contractual ingredient is included in the plaintiff's theory of the case. Accordingly, it is plain that his eighth instruction had no place in the case and was properly refused.

It may be proper in this connection to remark that the second instruction requested by plaintiff and modified by the court did refer to an agreement, and while that part of the instruction was probably erroneous, it was given as requested by him.

As between tenants in common where one is in the exclusive possession with the consent of the other, we do not think sections 8766-8767, Revised Statutes have any application. The tenant so in possession in the absence of an agreement as to time is but one at will or from year to year. The relation between them is not governed by the mining statute. If the plaintiff leased his moiety to the defendant, then they bore the relation and were subject to the obligations and entitled to the rights of landlord and tenant. Freeman on Co-tenants and Part., secs. 164-268. If, therefore, the defense interposed by the answer was sustained, there could be no recovery upon the theory of accounting alleged in the petition.

The plaintiff's ninth instruction embodied no issue made by the pleadings in the case. The defense, as has been seen, was that the plaintiff entered into an agreement by which the defendant was to conduct mining operations on the land and to pay plaintiff a certain per cent of royalty on all minerals mined, and that it had paid plaintiff in full that per cent. There is no defense of accord and satisfaction or settlement or compromise by which the plaintiff agreed to accept or did accept a less per cent than that agreed upon. Had there been such an issue in the case it is likely the instruction would have been well enough.

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And as to the plaintiff's eleventh, it is sufficient to say that the first part of it is correct in expression but the qualification following was incorrect. There was no contract pleaded by which the defendant agreed to mine and drain the land with machinery, in consideration of which plaintiff agreed to exact a less per cent of royalties than otherwise he would have been entitled as tenant in common. The instruction therefore exceeded the limits of the pleadings and was for that reason, if for no other, properly refused. Wright v. Fonda, 44 Mo. App. l. c. 642, and cases there cited.

And for like reasons the action of the court in declining to permit plaintiff to testify to the advantages that would result from mining and draining the land with machinery, etc., was proper. In view of the pleadings, the rulings of the court in respect to the admission of evidence and the giving of instructions were more favorable to plaintiff than they should have been, so that he has no just ground for complaint.

The judgment was for the right party and should be affirmed. All concur.

GEORGE REICHLE, Respondent, v. FRANK S. BENTELE, Appellant.

Kansas City Court of Appeals, December 1, 1902.

Duress: EVIDENCE: BONA FIDE DEBT. Evidence is reviewed and held insufficient to make a case of duress, since there was no threat of arrest—much less of immediate arrest—and the debt is admittedly a bona fide claim. (Cases considered.)

Appeal from Macon Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

AFFIRMED.

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Hess & Lacy for appellant.

(1) The court erred in taking the case away from the jury. Whether or not the note and mortgage was obtained under duress, was a question for the jury under proper instructions of the court. Cribbs v. Sowel, 87 Mich. 340; Thompson v. Wiggley, 26 L. R. A. 803; Bank v. Croco, 46 Kan. 620; Bank v. Kusworm, 26 L. R. A. 48; Ganz v. Weisenberger, 66 Mo. App. 110. (2) Duress exists when one by the unlawful act of another, is induced to make a contract under circumstances which deprive him of the exercise of his free will. 6 Am. and Eng. Ency. of Law, 64-69; Bryant v. Peck, 154 Mass. 460. (3) Under the evidence defendant was clearly entitled to go to the jury.

R. W. Barrow and *Guthrie & Franklin* for respondent.

(1) If one is under moral obligation to perform an act or make a contract, the mere fact that threats were made do not constitute duress and the law will hold that the act was done from moral obligation. Meredith v. Meredith, 79 Mo. App. 636. (2) Threats of imprisonment to constitute duress must be accompanied by the statement that "the prosecution had been begun and that the parties had the means at hand to instantly arrest and imprison." Buchanan v. Sartien, 9 Mo. App. 552; Wilkerson v. Hood, 65 Mo. App. 491; Claflin v. McDonough, 33 Mo. 412; Daris v. Luster, 64 Mo. 43; Danseh v. Crane, 109 Mo. 324. (3) As the mortgage was duly made and acknowledged, it can only be overthrown by clear, unequivocal and cogent testimony. Barnett v. Daris, 104 Mo. 549; Clark v. Edwards, 75 Mo. 87; Rust v. Coff, 94 Mo. 511; Biggers v. Building Co., 9 Mo. App. 210; Bohan v. Cosey, 5 Mo. App. 101; Springfield & Co. v. Donovan, 147 Mo. 622. (4) The case of Ganz v. Weisenberger, 66 Mo. App. 110, is not in point. That is a lightning rod case. The note and contract were without consideration and were procured by fraud, deception and intimidation. Clark v. Ed-

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wards, Admr., 75 Mo. 87; Biggers v. Building Co., 9 Mo. App. 210; Engine & Threshing Co. v. Donovan, 147 Mo. 622. (5) Defendant's evidence is vague, and uncertain. Defendant does not swear he was threatened at all. Taken in its broadest sense he does not swear to a threat to do anything. Buchanan v. Sarlien, 9 Mo. App. 558; Wilkerson v. Hood, 65 Mo. App. 491.

ELLISON, J.—This is an action of replevin for several head of cattle. At the close of the evidence the trial court gave a peremptory instruction for the plaintiff.

Plaintiff claims title by virtue of a chattel mortgage executed by defendant to secure the payment of defendant's note to plaintiff for $350. The defendant claimed that the mortgage and note were invalid for the reason that they were forced from him by threats of arrest and imprisonment in the penitentiary. His answer was that plaintiff told him that if he did not sign the note and mortgage securing the same, "then that he, the said plaintiff, would cause defendant to be immediately arrested and imprisoned in the penitentiary, and that in fear and apprehension of such imprisonment as aforesaid, and induced, frightened and intimidated by such threats" he executed the note and mortgage.

It appears that plaintiff, a man of seventy years, aided defendant, thirty years of age, in the purchase of a farm which cost $2,350. Plaintiff borrowed $400 of the money from one Snider for which Snider had a first mortgage on the land and plaintiff took a second mortgage for $1,950. Afterwards, matters were rearranged so that defendant borrowed of a loan company $1,600 and paid off Snider, giving the loan company first mortgage, the plaintiff releasing his mortgage securing the $1,950 owing him. Defendant paid plaintiff a part of that debt, but still owed him $1,100, for which plaintiff accepted his unsecured note. This latter note had become due and plaintiff learning that some other creditor was proceeding against defendant, prepared two notes, one for $750 to be secured by second mort-

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gage on the land, and the other for $350 to be secured by chattel mortgage. Defendant executed these notes and secured them by the land and the chattel mortgage under circumstances which defendant claims was duress. The evidence as to duress was, that plaintiff and his attorney, whom defendant knew to have been a prosecuting attorney for Macon county, came to his house and finding that he was in his field at work the plaintiff called him to the house. Plaintiff and his attorney asked him to sign the note and mortgage in controversy. That he hesitated and wanted to delay. Thereupon the lawyer showed him his former note of $1,100, and he told him it was all right that he owed the money. The lawyer said, but "that note has not any stamp on it," and then said: "Well, don't you know that you are in a fix?" And that, "that will cost you $500 or you get two years in the penitentiary." Plaintiff then spoke up and said to him "you simply sign them papers and then you are all right." Before signing he had plaintiff agree that he, plaintiff, would sign a writing stating that the interest was to be paid in produce, which plaintiff did. The paper was by their agreement to be left with a third party; and it was given to the attorney to deliver to that party.

We do not consider that the evidence made a case of duress, nor that it sustained the allegation of the answer. There was no threat of arrest; much less of immediate arrest and imprisonment, as charged. Plaintiff and his lawyer, according to his testimony, represented to him that he was liable to a fine or imprisonment in the penitentiary by reason of having omitted to stamp his former note. We feel compelled to pronounce the evidence insufficient to overturn the note and mortgage on the ground charged. So far as the debt represented by these instruments was concerned there is no pretense of imposition on defendant. It is admitted to be a bona fide claim.

We concede the evidence for defendant nearly made out a case for the consideration of a jury, but in our judgment it fails in the essential particular of de-

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fendant being deprived of his free will by a threat of immediate arrest and imprisonment. Defendant has cited us to Cribbs v. Sowell, 87 Mich. 340; Bank v. Croco, 46 Kan. 620; Bryant v. Peck, 154 Mass. 460 and Ganz v. Weisenberger, 66 Mo. App. 110; each of these cases show distinct threats and each of them represent cases of brazen imposition as to the money claimed. We have no access to two other cases cited.

The judgment should be affirmed. The other judges concur.

MATTIE GEORGE, Respondent, v. CITY OF ST. JOSEPH, Appellant; ANTHONY A. EDELBROCK et al., Respondents.

Kansas City Court of Appeals, November 3, 1902.

1. **Municipal Corporations:** CHANGING GRADE: OBSTRUCTING SIDEWALK: LANDLORD AND TENANT: PARTIES. A landlord had a water pipe laid into his house with a water plug in the sidewalk; thereafter the city changed the grade of the sidewalk and exposed the plug and plaintiff tripped thereon and was injured. She made the city, the landlord and the waterworks company defendants. The evidence showed the city, only, liable. *Held*, while the tenant in possession was a proper party yet since the city, only, was liable on the verdict, the failure to make him a party would not reverse the judgment.

2. ——: ——: ——: PROPERTY-OWNER: PRACTICE. In a trial against a city and a property-owner for an injury resulting from alleged negligence in front of the property when the city is shown to be liable, the judgment against it should not be affected by errors made in favor of the property-owner; but a city may make a point against the property-owner on such error on appeal if properly raised at the trial, and an instruction complained of is held proper.

3. **Evidence:** PERSONAL INJURY: PHYSICIANS: WRITTEN ORDER. Where the court appointed physicians to examine plaintiff's alleged injuries, while it may be proper to show that they made the examination under written order of court, yet the refusal to allow such proof is not reversible error.

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4. **Municipal Corporations:** PERSONAL INJURY: NOTICE: STATUTORY CONSTRUCTION. The object of the statute providing for written notice where a party has been injured on the streets, is to require notice of the time and place of the accident and its general nature and the attending circumstances in a general way so that opportunity would be afforded for examination and thereby prevent false or exaggerated claims; and where a party gave two notices, the latter referring to the same injuries as the first, and enumerating others, she will not be confined to the first in proving her injuries.

5. **Evidence:** OBJECTION: ORDINANCES: PRACTICE. A general objection that certain ordinances were incompetent and irrelevant is of no avail if they are competent for any purpose.

6. **Municipal Corporations:** CHANGING GRADE: OBSTRUCTING SIDEWALK: PROPERTY-OWNER: INSTRUCTION. An instruction broadly stating that no verdict could be rendered against the municipality unless one was rendered against the property-owner, is held properly refused.

Appeal from Buchanan Circuit Court.—*Hon. W. K. James,* Judge.

AFFIRMED.

Kendall B. Randolph for appellant.

(1) The court erred in permitting special ordinance number 303 and special ordinance number 304 providing for the grading and paving of Eleventh street to be introduced in evidence by the defendant Edelbrock. It was not a proper defense on the part of defendant Edelbrock that the city had graded and paved the street after the water plug or stop box had been placed. Carvin v. St. Louis, 151 Mo. 334; Franke v. St. Louis, 110 Mo. 526; Benjamin v. Railroad, 133 Mo. 274. (2) The court erred in refusing to permit the written order, directing Doctors Wallace and Bell to examine the plaintiff, to be introduced in evidence. The defendant city had the right to have the jury know that these doctors were not employed by the city to examine this plaintiff, but were entirely disinterested and had been selected and appointed by the court. (3) The court erred in overruling the special demurrer

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offered by the defendant city after all the evidence was in. The plaintiff having failed to make the tenant of the property a party defendant was not entitled to even try this case, and was not entitled to have it submitted to the jury, and should have been nonsuited. R. S. 1899, sec. 5723; Mancuso v. Kansas City, 74 Mo. App. 138; Masonic Assn. v. Cohn, (Ill.) 7 Munic. Corp. Cases 808, also reported 61 N. E. 439; Rider v. Clark (Cal.), 64 Pac. 564; Donoho v. Iron Works, 75 Mo. 401; Merrill v. St. Louis, 83 Mo. 254; Schweickhardt v. St. Louis, 2 Mo. App. 571. The case of Badgley v. St. Louis, 149 Mo. 122, does not apply because section 5723, supra, is an act of the Legislature and not a part of a freeholder's charter. (4) In the absence of evidence to the contrary the obligation to repair is presumed to be on the tenant. Ward v. Fagin, 101 Mo. 669. (5) The court erred in admitting in evidence the notices to the mayor of the city, as the same do not comply with the statute, and the first notice having been given, the plaintiff was bound by it and could not give a second notice alleging additional injury, and especially on the very last day on which notice could be given. R. S. 1899, sec. 5724. (6) The court erred in giving plaintiff's third instruction, in which it omitted to instruct the jury on behalf of the plaintiff as to the liability of the defendant Edelbrock. Cross v. Lackland, 67 Mo. 621; Carder v. Primm, 60 Mo. App. 423; Hohstadt v. Daggs, 50 Mo. App. 240; Linn v. Bridge Co., 78 Mo. App. 118; Link v. Westerman, 80 Mo. App. 592; Stocker v. Green, 94 Mo. 280; Chipley v. Leathe, 60 Mo. App. 15; Jackson v. Bowles, 67 Mo. 609. (7) The court erred in refusing to give on the part of the defendant city its refused instruction marked "K." This instruction was asked after the jury had been out about an hour, and its necessity being apparent when the jury returned into court and asked the court if they could render a verdict against the city without rendering one against the defendant Edelbrock, or vice versa, the court should, instead of allowing the jury to return to their room uninstructed, have given them a written

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instruction as asked by the defendant city. R. S. 1899, sec. 5723; Buck v. Railroad, 108 Mo. 190; State v. Miller, 100 Mo. 623; Wilkinson v. Dock Co., 102 Mo. 141; Dowzelot v. Rawlings, 58 Mo. 75; Wiggin v. St. Louis, 135 Mo. 558; Jegglin v. Roeder, 79 Mo. App. 428.

W. B. Brown and *Grant S. Watkins* for respondent.

(1) Appellant's first point, that the defendant Edelbrock had no right to introduce ordinances Nos. 303 and 304, is clearly erroneous. Burns v. City of St. Joseph, Oct. Term, Kansas City Court of Appeals, No. 5954. (2) The court properly refused to allow the defendant to introduce the written order in evidence, directing Drs. Wallace and Bell to examine the plaintiff, for the reason that it was not testimony, and for the further reason that the doctors were appointed for and on behalf of the city and became the city's witnesses. (3) Defendant filed its answer and pleaded to the merits of the case, and it was too late to raise a question of this kind, as our courts have held that this question must be raised before the defendant pleads to the merits, or he waives it, and for the further reason that the evidence shows that the property-owner, and not the tenant, was the one who did the repairing in this instance. Sec. 598, R. S. 1899; sec. 602, R. S. 1899; Franke v. St. Louis, 110 Mo. 521; Mancuso v. Kansas City, 74 Mo. App. 149; Wiggin v. St. Louis, 135 Mo. 558; Crenshaw v. Ullman, 113 Mo. 638. (4) Finding that other injuries became apparent after refused notice was given, it was her duty to give a second notice, and as plaintiff had sixty days in which to give that notice, she was entitled to wait until the last day, so that she might better determine, by advice of physicians, the extent, cause and nature of said injury. (5) The appellant at the time of the trial of this case, raised no objection that the court had not instructed on the question as to the rule of liability, as to the co-defendant Edelbrock. Neither did he call the court's

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attention to this fact in his motion for a new trial. Consequently that question is not before this court, as the appellant can not raise for the first time in this court a new issue. Drey v. Doyle, 99 Mo. l. c. 65; Wright v. Gillispie, 43 Mo. App. 253; Molan v. Johns, 124 Mo. 166; Mitchell v. Bradstreet, 116 Mo. 243; Constructive Co. v. Railroad, 71 Mo. App. 629; Hortskotte v. Menier, 50 Mo. 158; Mills v. Carthage, 31 Mo. App. 141. (6) And further, it could make no difference as far as plaintiff in this case is concerned, since the instructions given for plaintiff fairly presented the law as to the liability of the defendant city. As the error complained of is only as to the liability as between the co-defendants. Wiggin v. St. Louis, 135 Mo. 570; Waltemeyer v. Kansas City, 11 Mo. App. 36.

ELLISON, J.—This is an action for personal injuries received by plaintiff as the result of tripping over a "water plug" placed in a sidewalk in one of the streets of the city of St. Joseph. The verdict was for plaintiff against the city and for defendant Edelbrock. The latter was the owner of the property served by the waterpipe and it was occupied by one Shorrow as a tenant of Edelbrock. The water company placing the pipe in the street was made a party defendant, and a demurrer to the evidence was sustained as to it. Edelbrock had the connection with the house made and paid for it. The tenant Shorrow was not made a party. After the water plug was put in the street, the city graded the street so as to expose the plug.

(1) It is provided by section 5723, Revised Statutes 1899, that when a city of the second class, to which the defendant city belongs, shall be liable to damages by reason of the wrongful act or neglect of any person or corporation, they shall also be liable to the injured party and he shall join them as defendants in the action.

Conceding that this section of the charter of cities of the second class is not controlled by and is not within the reason of the decision in Badgley v. St. Louis, 149 Mo. 122, which declared a like provision in the charter

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of St. Louis invalid, there is yet no good cause for defendant's contention that the judgment should be reversed on account of the fact that the tenant, Shorrow, was not made a party defendant. There can be no necessity of making the owner or tenant a party, if the case shows that they are in no event liable. The object of the charter provision is to prevent circuity of the action and multiplicity of suits in those cases where the city can be held liable for the wrongful acts of others who are primarily liable, and who would in turn be liable over to the city. Wiggin v. St. Louis, 135 Mo. 568.

In this case there is no doubt that it was the city's act in changing the grade of the sidewalk which exposed the water plug so that it became dangerous to pedestrians. And that phase of the case was submitted in instructions for Edelbrock and the verdict was for him. While the tenant could have been made a party defendant on the theory that he was liable over to the city, yet since a trial of the cause has developed that the city is the wrongdoer and the owner and tenant in no way liable, it would be useless, as well as unjust, to reverse the judgment and remand the cause for another trial in which no different result could be reached.

(2) The defendant city complains of certain alleged errors made in favor of defendant Edelbrock. If there were errors in his favor and yet the case is such as that the city is legally liable to the injured party, the judgment against the city should not be affected by that error. Wiggin v. St. Louis, 135 Mo. 569-571.

But as the defendant city has an interest in the primary liability of Edelbrock as between the two, it would have the right to make the point on this appeal, if properly raised in the trial court. Ib. The only complaint here is made in the city's sixth point wherein it is claimed that plaintiff's third instruction wherein the general duty and liability of the city is set out, without referring to the liability of the defendant Edelbrock. We do not regard that as error. The instruction is without fault on all issues between plaintiff and the defendant city. The converse of all that was there

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said was put to the jury in the city's instructions, and the city nowhere attempted to have Edelbrock's liability stated. If we grant that in any case the city is liable to the action, then the additional liability of a co-defendant is matter more for the concern of the city than of the plaintiff, and such city has no right to complain of a failure on plaintiff's part to set forth by instructions the liability of the co-defendant.

(3) The court appointed two physicians to examine plaintiff as to her injuries. They did so and were called as witnesses by the defendant city, when it was endeavored to show by the court's written order that they had been appointed by the court to make the examination. We do not regard this of sufficient importance to reverse the judgment. It would not have been error to have allowed the proof, and why plaintiff would jeopardize her case by objecting to such harmless proceeding we do not know. At any rate, we think ill could not result and we rule the point against defendant.

(4) It is provided in the statute (sec. 5724, R. S. 1899) governing defendant city: "No action shall be maintained against any city of the second class on account of any injuries growing out of any defect in the condition of any bridge, street, sidewalk or thoroughfare in said city, unless notice shall first have been given in writing, verified by affidavit, to the mayor of said city, within sixty days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefor from such city."

It seems that plaintiff gave two notices to the city, one just after the accident and one just before the expiration of the sixty days limited by the statute. The latter referred to the same injuries mentioned in the first notice and then enumerated others as resulting from her fall. The defendant city objected to the notices, claiming that they did not comply with the statute; and that plaintiff was bound by the first one given. There is no merit in either objection. The object of

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the statute was to require a notice of the time and place of the accident and its general nature and the attending circumstances in a general way, so that the city could have opportunity for examination and inquiry and thereby avoid imposition by false or exaggerated claims.

It was not intended to confine the injured party at the trial, to just the kind and nature of injuries which may in good faith be mentioned in the notice. There may be latent injuries unknown to the party and many additional injuries or consequences may develop out of those which are known after the time limited has expired. It was not intended to confine an injured party, who has acted in good faith, to the specific injuries mentioned. In this view it is apparent that there could be no good reason for objecting to the second notice, for though it may have been unnecessary, defendant should have welcomed it rather than make complaint.

The court admitted in evidence two ordinances providing for paving and grading the street in which the water pipe was laid. The defendant city complains here that this had no tendency to exculpate Edelbrock. But at the trial the only objection made was the very general one that they were "incompetent and irrelevant." Such objection is of no avail if the evidence offered is admissible for any purpose, and they might well have been received against the city. But aside from this, it is clear from the nature of defendant's objection that it was only founded on a remark of the court as to that part of the ordinance for the paving and not the grading. The objection was "to that part." However it may be, we do not find reversible error.

Instruction "K" was properly refused. It stated broadly, as a matter of law, that no verdict could be rendered against the city unless one was rendered against Edelbrock. The facts developed in evidence did not justify such instruction.

There were other objections made but an examination of them has satisfied us that they do not authorize our interference, and we affirm the judgment. All concur.

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FERD HEIM BREWING COMPANY, Respondent, v. A. G. BELINDER, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Pools and Trusts**: MONOPOLY: CONTRACTS: COMPETITION: DEFENSE. Certain breweries had an agreement that they would not sell to any one indebted to either of the others for beer until he paid that debt. *Held*, the agreement tended to establish a monopoly, deprived the debtor of the benefit of competition and served to impose a penalty upon his condition, and was in conflict with the Missouri statute relating to pools and trusts, and constituted a bar to an action on an account owed to a member of the combination.

2. ———: ———: INTENTION. The intention of the parties to a contract will not avail when its effect is within the statute.

3. ———: ———: ———: ———: RIGHT TO SELL. One may exercise his choice as to whom he will sell but he can not enter into a contract whereby he binds himself not to sell, for he thereby barters away his right of choice and destroys the very right he claims the privilege of exercising. (Cases considered.)

4. ———: ———: ———: ———: ACT OF COMBINATION. Whether an act is harmful and unlawful is not determined by the fact that the same character of act could be committed harmlessly by one, since the doing of the act by a number may give it an impulse not only oppressive to individuals but mischievous to the public at large and thus give criminality to an act that would be perfectly innocent in a legal view when done by an individual. (Cases considered.)

5. ———: ———: ———: ———: PUBLIC: PRIVATE RIGHTS. Whether a combination is lawful or unlawful is ascertained by its character and purpose as it affects the rights of the public to unrestrained trade or as it affects the private rights of individuals, and an agreement not to sell to one in debt is an invasion of his rights since he has a right to buy which equals the right of another not to sell, and the latter's right can not be stretched to interfere with the former's right to buy of others.

6. ———: ———: ———: ———: COMMON LAW: STATUTE. A debtor, to fix a statutory penalty of disability to collect a debt by reason of an unlawful combination must show not merely a combination unlawful at common law, but likewise unlawful under the statute.

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7. ——: ——: ——: ——: DEFINITION. Competition is the struggle between rivals for the same trade at the same time; and without trade, which is the mother of competition, there can be no competition; and whatever restrains trade restrains competition in the same degree; and an agreement that no member of a combination shall sell to a debtor of one of them cuts off the right of the other members to compete for the debtor's trade, and is unlawful. (Cases considered.)

Appeal from Jackson Circuit Court.—*Hon. John W. Henry*, Judge.

REVERSED.

Wm. C. Forsee for appellant.

(1) If respondent was a party to an agreement to the effect that none of the brewers would sell to a retailer as long as that retailer was in debt to any other party to the combination, it was for the jury to say whether such agreement was one regulative of the price of beer or "designed or made with a view to lessen, or which tended to lessen full and free competition." Gutridge v. Railroad, 105 Mo. 520; Tyler v. Hall, 106 Mo. 313; Williamson v. Fisher, 50 Mo. 198; Kuhl v. Meyer, 42 Mo. App. 474; Higgins v. Railroad, 43 Mo. App. 547; Bender v. Railroad, 137 Mo. 240. (2) The policy of the law, irrespective of the statute, favors full and free competition. Contracts in restraint of trade were invalid at common law. And while we have found no case where the facts showed an agreement amongst the contracting parties to refrain from selling to a retailer who was at the time indebted to another manufacturer, we think the principles announced by the eminent authorities next hereinafter cited are strictly applicable to the case at bar. Lead Co. v. Paint Store, 80 Mo. App. 247; State v. Insurance Co., 152 Mo. 1; Handle Co. v. Handle Co., 59 S. W. 707; United States v. Pipe & Steel Co., 54 U. S. App. 749, 29 C. C. App. 151, 85 Fed. Rep. 282; Salt Co. v. Guthrie, 35 Ohio St. 666; Ertz v. Produce Exchange, 84 N. W. 743; Trust Co.

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v. McDonald, 146 Mo. 480; United States v. Knight, 156 U. S. l. c. 15, 16; United States v. Trans-Missouri Frt. Assn., 166 U. S. 342; Cohen v. Berlin, 59 N. E. 906; Greenhood Public Policy, 642; Bailey v. Ass'n Master Plumbers, 52 S. W. 853.

Ben T. Hardin for respondent.

(1) Is it unlawful, within the meaning of our anti-trust statute, for a number of persons engaged in selling a common article, to agree that they will not sell to any person, while he is indebted to any one of such number? R. S. 1899, secs. 8965, 8966, 8970. (2) Agreements designed and made for the protection of merchants are not within the inhibition of the statute, although they tend indirectly and incidentally to lessen competition. Anderson v. United States, 171 U. S. 675; United States v. Joint Traffic Assn., 171 U. S. 568; Hopkins v. United States, 171 U. S. 579; Pipe & Steel Co. v. United States, 175 U. S. 211-244; Dueber v. Howard, 55 Fed. Rep. 851; In re Green, 52 Fed. Rep. 104; Brett v. Ebel, 51 N. Y. S. 575. (3) Penal statutes should be strictly construed, and no offense not clearly within the letter and spirit of the act should be included by construction. State ex rel. v. Associated Press, 159 Mo. 410, 467; Dudley v. Tel. Co., 54 Mo. App. 391; Connell v. Tel. Co., 108 Mo. 457; State ex rel. v. Smith, 114 Mo. 180; State v. Bryant, 90 Mo. 537. (4) What one man may lawfully do singly, two or more may lawfully agree to do jointly. Hunt v. Simonds, 19 Mo. 583; Bohn v. Hollis, 54 Minn. 223; Kimball v. Horman, 34 Md. 407; Bowen v. Murdock, 96 Mass. (14 Allen) 499; Delz v. Winfree, 6 Tex. Civ. App. 11-15; Cote v. Murphy, 159 Pa. St. 420. Therefore, an agreement among several merchants not to sell to insolvents is valid. This was expressly ruled in Texas. Delz v. Winfree, 6 Tex. Civ. App. 11-15.

ELLISON, J.—The plaintiff is a corporation engaged in the manufacture of beer, and defendant was

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a customer of the plaintiff. This suit is on an account for beer sold to defendant, and plaintiff prevailed in the trial court. The principal point made here for reversal is based upon chapter 143 of the statute in relation to pools, trusts and conspiracies. It is provided in said statute (sec. 8965): Any corporation, partnership or individual who shall become a member of any pool, trust or combination to fix the price of any article of merchandise; or to limit the amount or quantity of any article of manufacture, shall be guilty of conspiracy to defraud. And (sec. 8966): All contracts or combinations designed with a view to lessen, or which tend to lessen full and free competition in the importation, manufacture or sale of any article or product in this State; and all contracts and combinations whereby it is proposed that any person doing business in this State shall deal in or sell any particular article and shall not during the continuance of such combination deal in or sell any competing article, are hereby declared to be against public policy, unlawful and void, and the parties thereto shall be adjudged guilty of a conspiracy to defraud. And (sec. 8970): "Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this article shall not be liable for the price or payment of such article or commodity, and may plead this article as a defense to any suit for such price or payment."

The only evidence which we need consider was that given by plaintiff's chief officer and that was that plaintiff and the other brewery corporations of Kansas City had an understanding and agreement that they would not sell to any one who was in debt for beer to either of the others, until he paid that debt. The statute aforesaid (sec. 8966) denounces any agreement, arrangement or combination made with a view to lessen, or which tends to lessen, full and free competition in the importation, manufacture *or sale* of any article. By such understanding and agreement between the brewers, no brewer would sell to a person indebted to another

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brewer for beer, and consequently the party indebted was deprived of the right of having them to compete for his trade. He was deprived of the benefit of competition and left at the mercy of his particular creditor who could impose any price he saw fit. Suppose the retail dealers at any place were to enter into an agreement that they would not sell to any one who was indebted for goods to either of the others; would not the effect be that the debtor would be confined to the one merchant and subject to any extortion he might conclude to impose? It would not be contended, at least it ought not, that a lawful agreement could be made that but one member of the whole number could sell to certain persons or classes of persons. Yet the effect of the agreement is as broad as that. When the others agree not to sell to the debtor of the creditor member, they deprive the debtor of the right to buy of any other than the creditor. The agreement imposes a penalty upon a condition which is not unlawful, but merely unfortunate. The effect and tendency of such agreements are wrong and are not only under the ban of the statute aforesaid, but they are against public policy. Many worthy people, through misfortune, become indebted, and they ought not to be met with an agreement which deprives them of the common right of citizenship to buy of whoever keeps for sale the article wanted. They ought not to be made to labor under a disability which is not imposed upon their more fortunate fellows. It is doubtless true that in many instances some sort of extra legal mode to collect a just debt from a dishonest debtor would find favor in the mind of most men. But we can not look to individual instances.

The question is, what is the tendency of the agreement? and what are the opportunities for oppression which the statute is designed to suppress? It does not affect the character of the agreement proven that the brewers only intended a worthy purpose. Intention will not avail when the effect is within the statute. And it has been held by the highest authority that though

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no imposition was consummated by the raising of prices; and even though the agreement was necessary to curb unjust or ill-advised competition, yet if the effect of the agreement was within the prohibition of the law, it was void (United States v. Addyston Pipe Co., 54 U. S. App. 747); and that, "in order to vitiate a contract or combination it is not essential that its result should be complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." United States v. Knight Co., 156 U. S. 16. And that, the necessary effect of the agreement is the criterion "no matter what the intent was on the part of those who signed it." United States v. Freight Assn., 166 U. S. 342. Those cases were examined and approved by the Supreme Court of Missouri in State ex inf. v. Ins. Co., 152 Mo. 1, and in our opinion much of the principle stated in the latter case can be fairly applied to this.

It is no answer to the view we have taken to say that any one has a right to refuse to sell to whomsoever he may elect. It is true he may so refuse; but the argument, properly applied, is disastrous to those who advance it. Any one may exercise a choice as to whom he will sell his goods, but he can not enter into a contract whereby he binds himself not to sell, for in such instance he barters away his right of choice and destroys the very right he claims the privilege of exercising. After entering upon such agreement he is no longer a free agent.

The cases are few where it has ever been held that the individual right may be lawfully exercised collectively, by contract. The cases of MacAuley Bros. v. Tierney, 19 R. I. 255, and Bohm Mfg. Co. v. Hollis, 54 Minn. 223, are among them. But it will be noticed that those cases, and any others with similar views, are not based upon statutes. And though decided on what is asserted to be general principles of law, they are not supported by the great weight of authority. Cases supra; Bailey v. Master Plumbers, 103 Tenn. 99; Nester v. Brewing Co., 161 Pa. St. 473; Moore v. Bennett, 140

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Ill. 69; People v. Sheldon, 139 N. Y. 251; Milwaukee Builders v. Niezerowski, 95 Wis. 129; Chapin v. Brown, 83 Iowa 156; India Bagging Assn. v. Rock, 14 La. Ann. 168; Vulcan Powder Co. v. Powder Co., 96 Cal. 510; Anderson v. Jett, 89 Ky. 375.

Since the foregoing was written, additional briefs have been filed presenting arguments against the views therein stated; which, on account of the importance of the question, we will answer—though, perhaps, causing some repetition of what has already been said.

Prominent among the points advanced is one based on the ground that the agreement not to sell to any one in debt to any member for beer is not a wrongful agreement at common law. And that it is not a wrongful agreement under the statute aforesaid.

In support of the assertion that the agreement not to sell beer to defendant was not wrongful, plaintiff (planting itself on the undoubtedly correct proposition that a dealer has the absolute right, whether prompted by caprice, malice or otherwise, to refuse to sell to another) has said that as it had then the lawful right to refuse to sell beer to defendant, and that whatever one had a lawful right to do, a number had a lawful right to agree to do. That is, that the lawful right of an individual, acting singly, could not become unlawful by the combined action of several to do the same thing. This expression is deceptively fair; so much so, that it has caught the mind of learned judges in some cases and has been stated in opinions, and made the basis of decisions. But there was never a greater error. If we can demonstrate its fallacy we will have succeeded in destroying the greater part of plaintiff's argument. The doing of intentional harm to others, or to the public, is wrong and in most cases is unlawful. But the doing an act, however bad the motive, if not harmful, is not unlawful. If, however, the act is done in a manner (which may include the number doing it) as to be harmful, then it may be unlawful. It is the unwarranted wrong committed which determines the unlawful character of the act. It is not determined by the fact

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that the same character of act could be committed harmlessly by one. There are acts which become wrongful on account of the number doing such acts; manifestly, the right of a single individual is of no consequence in determining the character of the act of the whole number. Thus, it is not unlawful for one man to stop on a highway reserved for pedestrians, yet it is clearly unlawful for a number to do so, especially by concerted action. In such instance the act of the one man was not harmful to any appreciable extent, while the act of the number obstructed the highway and became unlawful. And so it is not unlawful, nor appreciably harmful, for one dealer to raise the price of an article of absolute necessity; for in the natural course of trade, other dealers will supply the necessity at a price fixed by competition. But it is unlawful and harmful for all dealers to combine and by agreement raise the price. The act of the one dealer passes unnoticed by the public, while the same act by the combination interferes with trade and creates distress. Judge Gibson of the Supreme Court of Pennsylvania, said:

"There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that of any other individual, beyond the limits of fair competition; but the increase of power by the combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." Commonwealth v. Carlisle, Brightly (N. P.) 36.

Judge Thayer, of the United States Circuit Court

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of Appeals, said in Hopkins v. Oxley Stave Co., 83 Fed. Rep. 912, 920, "that the law will sometimes take cognizance of acts done by a combination which would not give rise to a cause of action if committed by a single individual, since there is a power in numbers, when acting in concert, to inflict injury, which does not reside in persons acting separately."

In Bailey v. Master Plumbers, the Supreme Court of Tennessee said: "A combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public." 103 Tenn. 118.

It was said by the Supreme Court of Connecticut, on the same subject: "Any one man, or any one of several men, acting independently is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase." State v. Glidden, 55 Conn. 46, 75. And such is the view of the United States Circuit Court of Appeals, as expressed by Justice HARLAN, in Arthur v. Oakes, 63 Fed. Rep. 310. No case upholding the right of combination in competition with a business rival has been more fully considered than that of Mogul Steamship Co. v. McGregor. It was tried before Lord COLERIDGE and his judgment is found reported in L. R. 21 Q. B. Div. 544. On appeal to the queen's bench his judgment was affirmed by a divided court. L. R. 23 Q. B. Div. 598. It was then appealed to the House of Lords and again affirmed in Appeal Cas. for 1892, page 25. On the first appeal, BOWEN, L. J., said: "Of the general proposition, that certain kinds of conduct, not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show

that the object is simply to do harm and not to exercise one's own just rights." In passing on the case, on final appeal, in the House of Lords (p. 38) it was conceded by the lord chancellor, "that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons becomes unlawful." Lord BRAMWELL made the same concession in these words (p. 45): "It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it can not be wrong when done by several. I think there is an obvious answer, indeed, two: one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: *de minimus non curat lex;* while if done by several, it is sufficiently important to be treated as a crime." The same concession was made by Lord HANNEN, where he said (p. 60): "There are some forms of injury which can only be effected by the combination of many. Thus if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual."

But all combinations of men are, of course, by no means unlawful. Whether a combination is lawful or unlawful is ascertained by the character and purpose of the combination. It is therefore necessary to determine whether the combination evidenced by the agreement of the brewers in this case was lawful. It may be considered in twofold character; one as affecting the right of the public to unrestrained trade; and the other as affecting defendant's private rights. Its admitted purpose was to prevent any brewers from selling to any one so long as he was in debt to any of them for beer. We have already stated that being in debt was

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merely unfortunate. No penalty follows such condition, nor does it involve a single right. To withdraw the right to buy from all persons in debt would, to a great degree, paralyze trade and cause much suffering. In order to properly appreciate the proposition of a right to prevent persons in debt from buying, the article in controversy in this case should be put out of view and all commodities of necessity brought into view. For if the right exists as to the article of beer, it exists as to all articles of merchandise. And if it exists as to one man it exists as to all other men in like situation. What then would be more iniquitous, or disastrous, than the proposition to prevent all persons in debt from purchasing the necessaries of life? We have no hesitation in declaring the combination wrongful and inimical to the rights of the public, as being in restraint of trade.

Did such combination as applied to defendant affect his rights? As already said, plaintiff had the right to refuse to sell to defendant. But defendant had the right to buy and plaintiff did not have the right to prevent others from selling to him by engaging them in a compact not to do so. For by so doing there was an invasion of defendant's right to buy. Each must exercise his right without infringing on the right of the other. Defendant can not construe his right to buy in such a way as to annul plaintiff's right to refuse to sell. And neither can plaintiff stretch its right to refuse to sell so as to interfere with defendant's right to buy of others. When plaintiff sought out other dealers and procured them not to sell to defendant, it got outside its own right and invaded defendant's. In the ordinary mutations of business, traders use their independent and unhampered judgment, and in consequence they are found courting the patronage of one to-day that they may have avoided yesterday. The change of opinion which, in the natural run of affairs, comes with change of situation and condition has free play when traders are left to act, each upon his own conclusion. In consequence, there would be no time when a worthy man,

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though in debt, could not find some persons willing to sell him their wares. That this phase of the natural law of trade was known and recognized by the brewers is evidenced by them deeming it necessary to enter into the combined agreement to restrain it. They realized that the exercise of the right not to sell a debtor by his creditor alone would leave him free to exercise his right to buy of others, and so they each combined with the other in an agreement to punish him by absolutely cutting off his right to trade; and thus their act was in clear violation of his rights.

But in order to fix the statutory penalty of disability to collect the debt, defendant can not stop at merely showing the combination to be unlawful at common law: he must show that it is unlawful under the statute. However much the ordinary principles of law may aid in fixing the character of the combination in question, the proper construction of the statute is the primary consideration.

Section 8966 declares that all contracts and combinations made either with a view to lessen, or which tend to lessen, free and full competition in the sale of an article shall be considered void and a conspiracy to defraud. Now, did the agreement that no member of the combination would sell to any one in debt to another member, tend to lessen competition?

As before stated, the argument of counsel for plaintiff is that the agreement was one that the brewers had a right to make and that it was, therefore, not wrongful; and being a rightful agreement, its interference with competition was merely incidental and, therefore, it did not fall within the meaning of the statute. We have already, for two reasons, shown that it was not a rightful agreement and the question is thus stripped of that supposed protection from the penalties of the statute. We have already characterized the agreement as wrongful and unlawful and we will consider whether its wrongful and unlawful character is of such kind or class as to bring it within the provisions of the statute aforesaid prohibiting any combination made with a

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view to lessen, or which tends to lessen free and full competition. The members of the combination would perhaps deny that they entered into the agreement with a view to lessen competition, and we will assume that they did not. But does it, *in fact,* lessen *or tend* to lessen competition?

Competition is the struggle between rivals for the same trade at the same time. It is self-evident that there can not be competition unless there is trade, and so though the popular saying is that, "competition is the life of trade," yet it is quite certain that trade is the mother of competition, for the latter springs from the former. So, therefore, whatever restrains trade restrains competition in exact degree. One of the reasons given by the Supreme Court of Massachusetts, why contracts in restraint of trade were void, was that "they prevent competition." Alger v. Thacher, 19 Pick. 51. And so the same thing is said in Beach on Monopolies and Trusts, section 36. We have already seen that the agreement and combination in question were in restraint of trade and, therefore, we must hold they tended "to lessen full and free competition," and are within the meaning of the statute. But we are not put to the necessity of showing this by deduction, for, as stated in the fore part of this opinion, the agreement struck directly at competition. The agreement was that no member of the combination should sell to a debtor of any other member. That is to say, all other members were cut out of the right to compete for the debtor member's trade.

We are cited to some cases which counsel urge in support of the legality and rightfulness of the agreement in question. None of them are in point. Those of Anderson v. United States, and Hopkins v. United States, 171 U. S. 604, 568, 579, do not reach the question involved here. Those cases merely decide (so far as bearing any analogy to this case) that where an agreement is made with no purpose or intention of restraining or affecting interstate commerce and which does not in fact restrain it (except in a remote and inci-

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dental way) is not avoided by the Federal statute. But the fact remains, that whenever the effect or tendency of the agreement is, in fact, to restrain trade, then the good intention of the parties, or their object to merely secure themselves mutual protection, affords them no defense to the charge of violating the Federal statute. That the statute itself must determine what it affects. That it includes all contracts in restraint of trade whether reasonable or unreasonable (though if the business was private and there be no statute, the restraint must be unreasonable). United States v. Freight Assn., 166 U. S. 290, 327, 328, 334, 341. Affirmed in United States v. Joint Traffic Assn., 171 U. S. 505; and also by Addyston Pipe Co. v. United States, 175 U. S. 211, 241, 242, 245.

In Kentucky there was a statute similar to ours when the case of Brewster v. Millers Co., 101 Ky. 368, arose. That case was where undertakers combined and agreed not to sell to or wait upon any one in debt to any other member for burial expenses. The plaintiff's wife died, whereupon he went to the Millers to engage their services at the funeral and to purchase necessary articles for that purpose. They refused him on the ground that he was then indebted to them for burying his father. The other members of the combination or association also refused on the ground of the indebtedness to Millers. Brewster (the plaintiff) then sued the members of the association. The court decided that he had no cause of action, but expressly disclaimed deciding that the defendants were not liable to the penalties and disabilities of the statute, since the action was not one "to enforce any contract or agreement made in violation of the statute." The case of Transportation Co. v. Oil Co., 50 W. Va. 611, is not applicable. The case of Hunt v. Simonds, 19 Mo. 583, was an action for damages occasioned to the plaintiff on account of a number of insurance companies agreeing to refuse and refusing to insure his steamboat. It was held that the action could not be maintained. The action is not to be likened to the defense in this case, and besides

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was without the support of a statute. Construed as plaintiff would have it, it would be out of harmony with repeated later rulings of the Supreme Court, especially that of State ex inf. v. Fireman's Ins. Co., 152 Mo. 1.

It is claimed by plaintiff that persons in trade have the right to combine for the purpose of mutual protection against dishonest debtors. That statement is made in the case of Schulten v. Brewing Co., 96 Ky. 224. While that case did not involve the violation or construction of a statute, and is altogether foreign to the questions involved in this case, yet it is not necessary for us to combat the proposition there stated. The agreement shown here was not an agreement that the brewers would not sell to dishonest debtors. On the contrary, it made no distinction and cut down the right of any who was in debt for beer to buy beer. It may be that a combination among merchants whereby they by proper means and in a lawful way, sought to protect themselves against false pretenders would not be an unlawful combination. And it may be (it is not our province now to decide) that if it was the practice of persons, dishonest and insolvent, to buy articles from dealers in merchandise, with the fraudulent intention never to pay for them, the dealers could form themselves into an association or combination and protect themselves from such preyers on the thrift of others. But a case of that kind is widely different from the one now before us. The statute, while aiming to protect the public from the evils of monopoly, was not designed to offer facilities for the cheat or fraud.

The result of the foregoing is that a recovery by plaintiff is expressly forbidden and the judgment must be reversed. The other judges concur.

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LIZZIE ROSS-LANGFORD, Respondent, v. THE MERCANTILE TOWN MUTUAL INSURANCE COMPANY, Appellant.

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Kansas City Court of Appeals, December 1, 1902.

1. **Insurance**: POWERS OF SOLICITING AGENT: WAIVING CONTRACT. An insurance company like an individual may, by writing or parol, modify or enlarge the powers of its agent or by its conduct and course of business estop itself to deny the power of such agent to waive forfeitures, proofs and the like, notwithstanding limitations of power in his appointment. (Cases reviewed.)

2. ———: ———: SCIENTER: ESTOPPEL. A soliciting agent being informed that the insured building was a dwelling with one room used as a millinery store, described the building in the application as a dwelling and the company accepted the premium and issued the policy. *Held*, the act of the agent is the act of the company, and it is estopped to question the correctness of the description or to claim a forfeiture of the policy.

3. ———: TOWN MUTUAL: POWERS OF AGENT: STATUTORY CONSTRUCTION. The statute providing that no officer, agent, etc., of a town mutual company shall have authority to waive conditions, etc., is made for the benefit of the company and may be waived by it, and while it may insist upon the limitations against the unauthorized acts of its agents, neglect to do so before the issuing of a policy and accepting the premium will prevent its doing so after a loss.

4. ———: ———: ———: ———. The statute is notice of the limitations on agents, but does not prevent the waiving of such limitations.

ON MOTION FOR REHEARING.

5. ———: ———: ———: WAIVER. Mensing v. The American Insurance Company, 36 Mo. App. 602, is considered in connection with similar cases and shown to be overruled in effect in Springfield Laundry Co. v. Insurance Co., 151 Mo. 90, and subsequent cases.

Appeal from Worth Circuit Court.—*Hon. Gallatin Craig,* Judge.

AFFIRMED.

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Fyke Bros., Snider & Richardson for appellant.

(1) The building insured was not a dwelling when insured or when destroyed. Its use in part for a millinery store or millinery shop deprived it of that character and changed the nature of its insurance risk. Gannett v. Albree, 103 Mass. 372; Mensing v. Ins. Co., 36 Mo. App. 602. (2) Agents of town mutual insurance companies organized under the Missouri laws can not waive conditions in the company's policies or applications for insurance otherwise than in writing. R. S. 1899, sec. 8091. (3) Missouri town mutual insurance companies are exempt from the general insurance laws of this State and sections 7973, 7974 and 7975, Revised Statutes 1899, are not applicable to or binding upon this defendant. R. S. 1899, secs. 8024 and 8091. (4) The defendant had the right to limit the authority of its agent or solicitor and did limit it by printed notice in the application signed by plaintiff and by provision in the policy accepted and held by her, and is not bound by any acts of said agent in excess of that authority. Thompson v. Ins. Co., 68 S. W. 889; Mensing v. Ins. Co., 36 Mo. App. 602; Rickey v. Ins. Co., 79 Mo. App. 485.

Chas. M. Street for respondent.

(1) By issuing a policy on a house and accepting the premium for insurance, the insurer is estopped to complain after the loss has occurred, of a misdescription of the house, of which its agent had knowledge. Williams v. Ins. Co., 73 Mo. App. 607. (2) The insurance agent can not be considered an agent of the plaintiff in framing the policy, since that would put the plaintiff in the position of contracting with himself. Joy v. Ins. Co., 35 Mo. App. 165. (3) Even if the evidence shows that the risk is dangerous, being so printed on the application, yet if the agent knows the facts and has authority to write the risk at all, then he has authority to create an estoppel against

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the company in the event of a misdescription of the building in the application. Rickey v. Ins. Co., 79 Mo. App. 485. (4) Requirements can be distinctly waived by the insurance agent, although exceeding his known authority. Bush v. Ins. Co., 85 Mo. App. 155.

SMITH, P. J.—This is an action on a fire insurance policy. The case disclosed by the record before us may be stated to be something like this:

The plaintiff was the owner of a small frame dwelling house containing five rooms situate in Denver—a village in this State—and desiring to insure the same against loss by fire applied to the defendant's agent to effect such insurance in defendant—a town mutual company organized under the statutes of this State (art. 9, chap. 119, R. S.) explaining to said agent the situation, character, etc., of the property. This latter, who was authorized to solicit insurance, receive applications, forward the same to said company and collect the premiums, filled out the plaintiff's application, and while he was so doing she told him that the "building was really a residence," but that "one room in it was used for a millinery store," and then inquired of him what he was going to call it and he replied, "a dwelling, of course;" and thereupon he wrote "dwelling" in said application, which was forwarded to the defendant and thereafter the policy was delivered to plaintiff and the premium paid by her. During the life of the policy the building covered by it was destroyed by fire.

The defendant in its answer alleged that in the application for the policy it was stated and warranted that the building on which the insurance was requested was occupied as a dwelling, and that upon such warranty the policy was issued. The answer further alleged that the said building was not in fact a private dwelling, or so occupied, but was in part a business house occupied and used as a millinery store without the consent of the defendant being given

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therefor, as provided in the contract of insurance, by reason of which the policy was void, etc. The answer further alleged that in the notice of loss required by the said policy the plaintiff stated that said building so destroyed was occupied as a residence and for no other purpose whatever, well knowing that in part it was occupied as a millinery store at the time of the fire, by reason of which false statement the plaintiff, under the terms of the policy in respect to the giving of notice, had forfeited her claim against defendant, etc.

The plaintiff in her replication alleged that at the time the application was made she informed defendant of all the facts with reference to the said building, and especially with reference to the portion of it that was used for millinery purposes, and that defendant, after being acquainted with the facts, itself wrote the said application and thereby waived any right to claim, and was estopped to claim, said building was not used as a dwelling, etc.

There was a trial in which the plaintiff had judgment and defendant has by appeal brought the case here for review.

The court at the request of the plaintiff instructed the jury to the effect, that if the "building was used for a dwelling at the time it was destroyed by fire and that plaintiff made proofs of loss for the same, then your verdict must be for the plaintiff, notwithstanding you believe from the evidence that said building was not used exclusively for dwelling purposes at the time the application mentioned in evidence was made, but that one room was used for a millinery store, provided you further believe that at the time plaintiff made application for said insurance of defendant's agent, the plaintiff disclosed the fact to said agent that one room of said building was used for a millinery store and that the defendant's agent thereupon wrote in said application that said building was occupied as a dwelling."

The court refused to instruct for defendant: (1) "The defendant is a town mutual fire insurance company, and it is not within the powers of its agent who

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took the application for the policy on which this suit is brought to waive any of the conditions of the application or policy unless such waiver was in writing, and even if you should find that the agent who took said application and issued said policy knew that said building was occupied as a millinery store or shop, still that would not constitute a waiver of the warranty in the application and policy that the building was occupied as a dwelling." (2) "That under the terms of the policy said building was insured as a private dwelling. Now if you find from the evidence that at the time of the fire, the same was not used as a private dwelling only, but was used in part as a millinery store, or millinery shop, plaintiff is not entitled to recover." (3) "That if you find from the evidence that plaintiff made an application in writing for the policy sued on and that it is stated in said application that the building was occupied as a dwelling, then said statement constituted a warranty that said building should be so occupied as a dwelling only during the continuance of said policy, and if you find from the evidence that a portion of said building was at the time of the fire or at any time subsequent to the issuing of the policy had been occupied and used as a millinery store or shop, plaintiff is not entitled to recover."

These instructions clearly outline the respective theories of the parties and that upon which the case went to the jury. These theories are so diametrically opposed that if one be right it inevitably follows that the other is wrong. One of the principal questions arising in the case is whether or not the statement in the application that the building on which insurance was issued was a frame dwelling, without the mention of the fact that one room therein was occupied as a millinery shop, was a misdescription amounting to a misrepresentation of a material fact concerning the subject of the insurance, and if so should it have the effect to invalidate the policy? We can not see that any other effect can be given it under the express conditions of the policy pleaded unless the defendant has in some

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way waived its right or is estopped to insist on said misrepresentation as ground of forfeiture.

It is conceded that the defendant's soliciting agent, after he was apprised of the fact that one room of the plaintiff's building was used for a millinery shop, was accorded and exercised the option of selecting the term which should be written in the application as descriptive of the plaintiff's dwelling. He it was who, with all the facts and circumstances touching the occupancy and use made of the plaintiff's building, elected to term it in such application a "frame dwelling." If he was the agent of the defendant and his act was that of the defendant, then the term used in the application in describing the building was that of the defendant's own choosing. The application thus written was accepted by the defendant, the policy written and delivered, and the premium thereon was paid. It is claimed that this constituted a waiver or was in legal effect the same as striking the condition from the policy.

The defendant, on the other hand, claims that since the application in plain and unambiguous terms gave notice to the plaintiff that it would be bound by no statement made to an agent not contained in the application, or, which is the same thing, that no statement made to an agent not in writing would be effective to bind defendant, that, therefore, the statement made by the plaintiff to defendant's agent as to the occupancy of a part of her building was as if it had never been made.

Under the law, as it has been repeatedly declared by the appellate courts of this State, there can be no doubt that a principal has the power to limit the authority of its agent and can not be held for acts of the latter in excess of his powers. In Thompson v. Ins. Co., 68 S. W. 889, it was said that the cases in this State "give full effect to the contractual power of the principal to limit the authority of his agent in the original appointment or at any other time, but they also give like effect to all subsequent powers conferred by the principal upon his agent, either expressly or by implication, or by estoppel, notwithstanding such

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powers are in conflict with, in derogation of, or in enlargement of the powers originally conferred. And this rests upon the doctrine that in each instance the principal binds himself, not that the agent binds the principal beyond his powers to bind him. The act of the principal limiting the power of the agent is not irrevocable at the will of the principal. As the principal has the freedom to contract to impose the limitations upon the power and authority of the agent in the first place, so, also, the principal has the freedom to contract to remove, abolish, alter, diminish, or increase the limitations originally imposed upon the power of the agent, and this the principal may do in any manner that in law will be binding upon him; but in every case it is the act of the principal that the law simply enforces, and not the unauthorized act of an agent, done in excess of the authority conferred.'' And in the same case it was stated that the policy then under consideration contained a provision that no agent except the secretary of the company should have the authority to waive, alter or modify the terms of the policy, nor to waive any forfeiture of the policy, nor to revive any forfeited policy, any contract by parol, or otherwise, or understanding with the agent to the contrary notwithstanding. This statement is followed with the observation that the defendant concedes that the rule has long obtained in this State that notwithstanding such express limitations of the power in the agent by the terms of the policy, the insurance company, just like any individual who has so stipulated in the power appointing an agent, may afterwards, by another writing or by parol, modify or enlarge the power of the agent, *or by its conduct and course of business with the assured be estopped to deny that the agent had not power to waive forfeitures, proofs of loss and the like, notwithstanding the limitations of power contained in his appointment,* citing Nickell v. Ins. Co., 144 Mo. 420; Laundry Co. v. Ins. Co., 151 Mo. 90.

And so it has been held that agents in soliciting insurance when they undertake to prepare the applica-

tion of the insured or make any representations to the insured as to the character or effect of the statements of the application, will be regarded as doing so as the agents of the insurance company and not of the insured. Ins. Co. v. Wilkerson, 13 Wall. 222. In Combs v. Ins. Co., 43 Mo. 148, it was said that the authority of the agent of an insurance company to take applications for insurance carried with it the legal implication of authority to fill up the application and do all things needful in perfecting it; and that the acts of such agent were the acts of the company, and that from this it followed, necessarily, that the doctrine of estoppel *in pais* applied and the company could not after loss disprove the statements that may well be said were made by it. It accepted the application, knowing the facts, and assumed the risk with this knowledge. Thomas v. Ins. Co., 20 Mo. App. 151. And in other cases in this State it has been in substance said that it matters not that the policy may stipulate that consent or waiver could only be effective by writing indorsed on the policy. In such circumstance failure of literal compliance with the stipulation would not be allowed to work a forfeiture—the company being estopped to make such claim. Hamilton v. Ins. Co., 94 Mo. 368; Anthony v. Ins. Co., 48 Mo. App. 65. And neither is there any impediment to waiving a stipulation as to waiver. Barnard v. Ins. Co., 38 Mo. App. 113; Anthony v. Ins. Co., supra. Williams v. Ins. Co., 73 Mo. App. 607, was an action on a fire insurance policy where a forfeiture was claimed on the double ground that there was a misdescription in the application as to the kind of building and as to its value. The misdescription was conceded and that the agent who took the application wrote the description of the building from his knowledge of it. "In such circumstances," it was said by the judge who wrote the opinion, "the knowledge of the agent should be imputed to the company. With this knowledge, after having issued the policy and accepted the premium for insurance, it should not be heard to complain of the misdescription after loss. . . . Nor

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does the fact that the application was read over to plaintiff alter the case. The fact still remains that the insurance company issued the policy and accepted the premium with knowledge that the house was misdescribed,'' citing cases. And in the recent case of Bush v. Ins. Co., 85 Mo. App. 155, it was said that ''it is now held that though the authority of the agent is limited and the knowledge of the limitation is brought home to the assured, yet the acts of the agent are considered those of the company itself, and they may bind the company though exceeding the limitation,'' citing James v. Ins. Co., 148 Mo. 1; Laundry Co. v. Ins. Co., 151 Mo. 90.

In view of the rulings in the cases to which we have referred, it is clear that the acts and declarations of the defendant's soliciting agent while writing the application were those of the defendant, and as its agents was apprised of the fact that the building was partly occupied as a millinery shop and with this knowledge it chose to designate and describe the building and its use as a ''dwelling,'' to accept the application so written by its agent, to issue the policy and receive the premium thereon, it ought to be estopped to question the correctness of the description of the subject of the insurance, or to claim a forfeiture under the provisions of the policy.

But it is contended that the defendant could not waive the conditions either of the application or the policy because of the limitation contained in section 8091, Revised Statutes, which is that *no officer, agent or other employee* shall have authority to waive any conditions of the application or policy unless such waiver be reduced to writing upon the application and policy, or attached thereto. This section is found in article 2, chapter 119, Revised Statutes, supra, and is therefore a part of the defendant's charter; and the question now is, what effect if any shall be given to it in its application to the present case. It is a new section and so far as we know has not been noticed in any reported adjudication.

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Manifestly, it was introduced into the defendant's charter for its benefit and may be waived by it, for it is very well settled that a party may waive the provision of a contract or statute made for his benefit. White v. Ins. Co., 4 Dillon l. c. 183; Shutte v. Thompson, 15 Wall. l. c. 159; In re Cooper & Co., 93 N. Y. l. c. 512; Lee v. Tillotson, 24 Wend. 337; Cooley's Const. Lim., 181. If it chooses to do so a mutual insurance company may abandon its right to insist upon the protection afforded it by the statutory limitation; as, for illustration, a solicitor may write an application which he is apprised misdescribes the character of a building or its distance from another, or misstates its value or the incumbrances thereon, and with this knowledge of the solicitor, which is the knowledge of the company, the application is received, the policy issued and the premium paid, it would thereby waive the right to insist upon the statutory limitation and be estopped to claim a forfeiture. It would have the right to insist upon the limitation in such case for its protection against the unauthorized acts of its soliciting agent, but if it neglected to do so before issuing the policy and accepting the premium, it could not do so after a loss occurs. This would operate as a fraud on the assured.

This statute is notice to all applicants for insurance in town mutual companies of the limitations on the power of their soliciting officers, agents and employees. Since it became operative it has been unnecessary for these companies to give notice of such limitations in any other way. But it does not disable or incapacitate such companies to waive any of the conditions of an application or policy or to modify or abrogate the same unless in writing.

It seems clear to us that this statute in no way helps the defendant in its contention. It had knowledge of the misdescription and with that knowledge it accepted the application, issued the policy and took the premium, and it should not be permitted after loss to, for the first time, claim that its soliciting agent in writ-

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ing the application exceeded the limitations placed by the statute on his authority; or, which is the same thing, to insist that the description of the building which the agent adopted himself as proper and sufficient, is such a misdescription as avoids the policy. It would be a fraud and upon principle it ought to be estopped to make such claim.

We think the court did not err either in the giving or refusing of instructions. The judgment must be affirmed. All concur.

OPINION ON MOTION FOR REHEARING.

SMITH, P. J.—It is insisted that while this case is like that of Mensing v. The American Ins. Co., 36 Mo. App. 602, it has been decided contrary to the way that case was decided. Are the two cases alike?

In this case, the plaintiff in her written application for the policy warranted that the building which she sought to have insured was occupied as a dwelling, and it was upon this warranty the policy issued. The policy provided that if the insured misrepresented in writing any material fact concerning the subject of the insurance, it would be void. There was also a further provision to the effect that this policy is made and accepted subject to the foregoing stipulations and conditions: ". . . and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions and conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission, affecting the insurance under the policy, exist or be claimed by the insured, unless so written or attached."

The policy in the Mensing case provided that the "insurance in this company is confined to farmhouses,

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barns and outbuildings, private dwellings and private barns in towns . . . and no authority is given to any agent to take any application in any other class of property, and not upon any property exposed within one hundred feet of a store, hotel, public boarding house, mill, manufacturing establishment, or other extra or special hazard." The application stated the property to be a dwelling house, when it was, in fact, a boarding house with a saloon in the front room. In this case, as has been set out, the property was stated in the application to be a dwelling house, when it was a dwelling, in one room of which was a millinery store, and this fact was known to the agent at the time he wrote the application.

In the Mensing case there was contained in the policy a limitation on the authority of the agent of which the insured had notice that no agent had authority to take any application for insurance on any other class of property than that specified in the limiting clause. The agent of the insurer knew at the time he accepted the application that the property was not a dwelling house but a boarding house and saloon. On this state of facts it was held by us in that case that the limitation contained in the policy was notice to the insured that the agent had no authority to insure a boarding house and saloon, and that the defendant had the right, as any other principal, to limit the authority of its agents; and to allow the plaintiff to recover would be to hold defendant liable for a risk it did not take.

In the present case, the plaintiff had notice that any statement respecting the subject of the insurance made by her to the agent, or by him to her, would not bind the insurer unless in writing. According to the rule declared in the Mensing case, it would seem that the knowledge of the agent that the property was misdescribed in the application was of no consequence and would not validate the risk. If the insurer had the right to limit the power of its agent in the one case, it is difficult to see why it did not in the other. In principle the two cases are quite alike. If the Mensing

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case had not been trenched upon or overthrown by later cases, which we are bound to follow, it would appear this case was incorrectly decided.

In the later case of Shoup v. Ins. Co., 51 Mo. App. 286, where the policy expressly provided that the insurer should "not be bound by act or statement made to any agent unless inserted in the contract." In the application for the insurance it was stated that the applicant was the sole owner in fee of the land on which the subject of the proposed risk stood, while in truth the applicant only had a homestead interest therein. It was shown that the applicant informed the agent who solicited the insurance and wrote the application of the true state of the title. In the opinion in that case, after quoting what was ruled in the Mensing case, it was held that the limitation on the agent's authority was directly in the way of the plaintiff's recovery. That the plaintiff could not be permitted to show that the agent was informed of the true condition of the title.

In Jenkins v. Ins. Co., 58 Mo. App. 210, the limitation contained in the policy was that, "no act or deed or promise made by any agent, not indorsed hereon, shall be construed into a waiver of the printed terms or conditions, and any changes or waivers can only be made in writing by either the secretary or the district agents at Montgomery City, Missouri." The policy also contained a stipulation that, "if the assured without written permission hereon shall now have, or hereafter make or procure any other contract of insurance, whether valid or not, without consent indorsed hereon, the policy shall be void." It appears that after the issue of the policy the insured without the written consent of the insurer or its agents, procured other insurance on the same property. The insured was not permitted at the trial to prove that the agent of the insurer was apprised of the other insurance—and this refusal on the appeal was held proper. It was further held that the limitation was effective and that a soliciting agent in the face of such a limitation could not waive the conditions of the policy.

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But in Springfield Laundry Co. v. Ins. Co., 151 Mo. 90, both the Shoup and Jenkins cases are expressly overthrown and declared "not longer to be followed," and thereby declaring, as said by us in Wolf v. Ins. Co., 86 Mo. App. l. c. 583, that the soliciting agent of an insurance company with limitations imposed upon his authority similar to those in that case, known to the insured, may waive the conditions of the policy. The limitation in the Wolf case just referred to (75 Mo. App. 336; 86 Mo. App. 580) was similar to that in the Jenkins case, but being obliged to follow the ruling in Laundry Co. v. Ins. Co., supra, we changed front, as will be seen by reference to the two opinions delivered on the second appeal—86 Mo. App. ante.

The Mensing case is in no way distinguishable from the Shoup and Jenkins, or the first of the Wolf cases, and as the two former of these have been overthrown by the Supreme Court, and the latter by ourselves, we can not see why it—the Mensing case—may not, too, like its parallels referred to, be considered as overruled and "no longer to be followed."

The question has been pertinently asked whether or not under the law of principal and agent, as it has been declared in this State, in so far as applicable to insurance companies, an insurer can in any case impose a limitation upon the authority of his agent that will be efficacious, even though such limitation be in writing and brought to the notice of the insured? The only answer we can make is to cite Springfield Laundry Co. v. Ins. Co., ante, and James v. Ins. Co., 148 Mo. 1.

It is needless to say that if our ruling in this case is opposed to that in the Mensing case, that it is in accord with the last of the Supreme Court.

The motion will accordingly be denied.

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W. P. CURRELL, Respondent, v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Pleading:** CONTRACT: BREACH: PETITION. A petition set out in the opinion is held as pleading a breach of an unpleaded contract and, therefore, not to justify the introduction of any evidence, since a contract must be pleaded *in haec verba* or according to its legal effect with a proper assignment of the breaches relied on.
2. ———: AIDER BY ANSWER: ACTION. The defective allegations of a petition may be supplied by those of the answer so that when read together a cause of action is stated.
3. ———: ———: REPLY: ISSUE. A petition pleaded the failure to furnish cars to ship cattle at one o'clock in the morning. The answer set up a contract to ship plaintiff's cattle that day and to deliver them in Chicago on the next day, and averred plaintiff's refusal to ship. The reply admitted the contract as set out in the answer. *Held,* if the answer supplied the defects of the petition as to the provisions of the contract, then the issue was on the contract in the answer and not on the alleged breach of another and different contract referred to in the petition, and plaintiff could not recover for the breach alleged in his petition.
4. ———: ———: ———: ———: EVIDENCE: INSTRUCTIONS. On an examination of the evidence, *held,* there was no proper evidence sustaining a breach of the contract averred in the petition, and instructions authorizing a recovery were improper and could not be referred to the contract set up in the answer, since on that contract it was immaterial when the cattle should be shipped, the material part being their delivery in Chicago at the agreed time.
5. ———: ———: ———: ———: ———: ———. On the evidence it is *held* that defendant sustained the averment in its answer that it was ready and willing to ship plaintiff's cattle on the day mentioned and that issue was submitted to the jury by one of defendant's instructions showing that the case was not tried on the theory of the answer aiding the petition.
6. **Trial Practice:** PLEADING: DEFENDANT'S INSTRUCTION: ESTOPPEL. The fact that a defendant may submit and ask instructions on the theory on which the court tries the case will not estop him from insisting that the case was tried on a false theory where on the very threshold of the trial he denies plaintiff's right of recovery, since the defendant can not abandon his case because the ruling of the court is against him, but is forced to fight the battle on the ground selected by the court and his adversary.

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7. **Pleading: AIDER BY ANSWER: PETITION (per Smith, P. J., *dissenting*). The allegations of the answer aided the defective petition and accomplish all that could have been done by an amended petition and defendant's answer admitted the existence of the contract and set forth its provisions, and thereby supplied the omissions of the petition.**

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes,* Judge.

Reversed.

William Henry, John Cross and *C. A. Mosman* for appellant.

(1) The defendant's objection to any evidence under the petition should have been sustained. (2) The defendant's demurrer should have been sustained. The evidence for plaintiff failed to establish a promise or agreement on defendant's part to have the cars at the station at one o'clock in the morning. The language detailed in evidence was not an undertaking to have the cars there at one o'clock a. m. Johnson v. McCune, 21 Mo. 211; s. c. 27 Mo. 181; Land Co. v. Pitt, 114 Mo. 135; Land Co. v. Hanna, 126 Mo. 5. (3) There was no evidence tending to support the allegation that when the cars arrived it was too late to get to Chicago in time for the market. (4) Again, the rule of law is, that a party to a contract, who has prevented the opposite party from performing his part of the contract, can not sue upon it. Plaintiff could not demand a guaranty that the cattle would arrive in Chicago by a certain hour, and when defendant declined to give it, abandon the contract, drive his cattle home, and sue the defendant for the damages occasioned by such driving. His act created the damage for which he sued. Spurlock v. Railroad, 93 Mo. 530; Berch v. Sander, 37 Mo. 104; Doyle v. Turpin, 57 Mo. App. 84. (5) The time the cars were to arrive at the station was not of the essence of the contract. Heating Co. v. Bennett, 41 Mo. App. 420. (6) Even if it be held that the de-

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fendant had expressly contracted to have the cars at the station at one o'clock and that the defendant failed to keep its agreement, still that was no justification for his abandoning the contract. At most, in law, it only entitled him to compensation for any damages resulting directly to him from the violation of the contract by defendant. Wherever "the substance of the contract can be executed, it will stand, and the remedy is in the way of compensation." Harl v. Handlin, 43 Mo. (171) 175; Manfg. Co. v. McCord, 65 Mo. App. 509 and 510.

F. B. Ellis for respondent.

(1) In this case the main dispute is as to what the contract was. Where there is no dispute as to the terms of an oral contract, and it admits of but one interpretation, then its construction is for the court, but where its terms are controverted, as in this case, it is then a question of fact to be determined by the jury. Davis v. Baldwin, 66 Mo. App. 577; Halbert v. Halbert, 21 Mo. 284; Farley v. Pettis, 5 Mo. App. 265. (2) The appellant next contends that there was a variance between the allegation of the petition and proof in this: that the cause of action was bottomed upon the failure of the defendant to furnish cars in time to ship the cattle to the market, when the proof shows that there was ample time to load and ship the cattle and have them upon the market for which they were being shipped. Even if this is the case, there was evidence to go to the jury that there was not time, and the appellant had this question submitted to the jury by proper instructions, and it can not now complain. The question now contended for by appellant was submitted to the jury in an instruction which told the jury that if the defendant had the cars in readiness in time to ship the cattle so that they could have been sold upon the market for which they were being shipped, then they were to find for the defendant. While we think from the evidence the instruction is erroneous, the defendant

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can not complain. If it was error they invited it, and they can not now take advantage of their own wrong. (3) He was told by defendant when he should have them at the depot. He had them there at that time. It appears that time was the essence of this contract. If plaintiff could not get the cars in time to make a certain market, he would not need them at all. There are cases where time may be the essence of a contract. Railroad v. Levy, 17 Mo. App. l. c. 501; Melton v. Smith, 65 Mo. 315. (4) Where a railroad company contracts to furnish cars at a certain time and for a special shipment and it fails to furnish the cars in accordance with such contract the company is liable for damages for a breach of such contract. Baker v. Railroad, 91 Mo. 552; Gown v. Railroad, 72 Mo. App. 34; Aull v. Railroad, 66 Mo. App. 388; Harrison v. Railroad, 74 Mo. 365; Leonard v. Railroad, 62 Mo. App. 252.

BROADDUS, J.—As a proper determination of this cause turns upon a construction, to some extent, of the pleading of the parties, it becomes necessary to incorporate certain parts of the petition in this opinion. The petition alleges: "That on the eleventh day of September, 1900, in consideration of the promises then and there made by the plaintiff, he would drive to the defendant's station at Lathrop, Missouri, and have there on the thirteenth day of September, 1900, ready for shipment and to be shipped over defendant's railroad, seven thirty-six-foot cars, cattle sufficient to fill said cars in readiness to receive and transport plaintiff's said cattle, as aforesaid, all of which defendant's agents and servants then and there well knew, said cattle were to be sold upon the markets of Chicago, Friday morning, the fourteenth day of September thereof; that plaintiff relying on said undertaking and agreement, drove his said cattle to said station on said thirteenth day of September at said station, ready for shipment and to be shipped on said defendant's railroad to Chicago, Illinois, cattle sufficient to fill said cars. Plaintiff further states that the defendant, disregarding its

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said undertaking and agreement, failed to provide and furnish or have in readiness at said station on said thirteenth day of September any cars to receive and transport plaintiff's cattle as aforesaid, and did not furnish said cars at the hours that it was understood and agreed to have his said cattle in readiness, at one o'clock a. m., on the thirteenth day of September aforesaid, and did not provide or furnish said cars until 4:30 a. m. of said day, too late for plaintiff's cattle to be transported and sold on the market for which they were being shipped, and of which defendant then and there well knew."

The petition further proceeds to allege that by reason of the failure of defendant to provide cars in time for shipment for the Chicago market of September 14, they were not shipped by him but returned to his farm, and that by reason of all which their value was depreciated on account of shrinkage to his damage in the sum of five hundred dollars.

The defendant's answer, after a general denial of the allegations of the petition, among other things alleges, that the contract of the defendant was to provide at said station of Lathrop a sufficient number of cars, to receive and transport the plaintiff's cattle to the Chicago market, that said cars were to be furnished by it on the thirteenth day of September in time for said cattle to reach said market on the fourteenth day of said month, and that said cars were so furnished by it at said station to receive and ship said cattle, on said day in time for shipment to said market for said fourteenth day of said month, but that plaintiff failed and refused to ship his cattle as he had agreed by the terms of his contract to do.

On the trial the plaintiff for recovery relied upon the fact of the failure of the defendant to have its cars on hand in readiness for loading and shipment at one o'clock, September 13. The defendant objected to the introduction of any evidence under the petition in the case, for the reason, that it did not state a cause

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of action. The objection was overruled and defendant duly excepted to the action of the court in overruling its objection.

It will be seen by an examination of the petition, which is very loosely drawn, that it does not allege the existence of any contract between himself and the defendant for the shipment of his cattle to Chicago, but at most, it can only be construed as pleading a breach of an unpleaded contract. It is a familiar rule of pleading, that in actions to recover damages for the breach of a contract, a contract must be set out *in haec verba* or according to its legal effect, with a proper assignment of the breaches relied on. Langford v. Sanger, 40 Mo. 161; Peck v. Bridwell, 6 Mo. App. 451. It follows, therefore, that the introduction of any evidence under said petition was inadmissible by reason of its fatal defects, unless such defects were cured by the defendant's answer. The answer does set out that there had been a contract entered into between the parties, for the shipment of the plaintiff's cattle from said station of Lathrop to Chicago, the substance of which, we have seen, was that the defendant agreed to have the necessary cars for their reception and shipment at the station on September 13, in time for their transportation to Chicago for Friday's market, September 14, but that defendant failed and refused to ship his cattle.

It is also a rule of pleading that the defective allegations of a petition may be supplied by those of the answer, so that when read together, a cause of action is stated. Insurance Co. v. Tribble, 86 Mo. App. 546. The plaintiff in reply to defendant's answer admitted the contract as set out therein. If, then, the answer of the defendant is to be treated as supplying the defects of plaintiff's petition as to the averment of a contract between the parties, then the issue on trial was on said contract and not on the alleged breach of another and different one. But as the plaintiff was seeking to recover for the breach of an unpleaded contract, for failure of the defendant to accept and ship his cattle at one o'clock September 13, and not for failure

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to accept and ship them on said day in time for their arrival at Chicago for the market of Friday, September 14, he was not entitled to recover for the alleged breach, for the issue, if any, was on a breach of the contract as set out in said answer.

But we are of the opinion that there is a marked difference between the two contracts, and that the alleged breach of contract is not to be referred to and made applicable to the one pleaded by defendant. The case was tried upon the theory, as all the plaintiff's instructions show, that he must recover, if at all, upon the allegations of his petition, and not upon the contract set out in defendant's answer. The defendant objected to all said plaintiff's instructions, and they should not have been given, for there was no evidence, when properly considered, to show that the defendant had agreed to accept and ship the cattle at any specified hour on September 13. All that was proved was that defendant had agreed to provide cars sufficient for the purpose and have them on hand at the station on September 13, in time for the loading and transportation of plaintiff's cattle so that they would reach Chicago on the market of Friday, September 14. The statement of defendant's agent at the time the contract for shipment was made, for the plaintiff to have his cattle at the station so that loading on the cars could begin at one o'clock a. m., in order to get them to Chicago at the desired time, was merely a precaution upon the part of the agent to enable the defendant to carry out the terms of delivery at the point of destination. Whether plaintiff got his cattle to the station at one o'clock or four o'clock a. m., on the day named, was immaterial, if the defendant offered to accept and ship them, for under its contract it was bound to have them at their destination by the designated time, or answer in damages to the plaintiff, if any, caused by delay.

The defendant sought to show on the trial, and we think successfully, that on September 13 it was ready and willing to receive and ship plaintiff's cattle, in time for their arrival at Chicago for Friday's market. In

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fact, the court at the instance of defendant instructed the jury in an instruction on this theory of the case. Thus we see that the case was not tried upon the theory that the defendant's answer aided or supplied the defects of the plaintiff's petition, but that the petition set up one contract, and the answer another and different contract.

The defendant submitted and obtained instruction as to the supposed issue raised by the plaintiff's petition, and the question arises, is it now estopped from saying that the case was tried upon an issue not raised by the pleadings? We think not, under the rule announced in a well-written opinion of Judge GANTT in Cochran v. Railroad, 113 Mo. 359, to-wit: "It must be remembered that a defendant occupies a different attitude from his adversary, the plaintiff. The plaintiff brings the action. If the ruling is adverse, he may take a nonsuit. Not so with the defendant; he is in court without his consent. The court may make any number of rulings that he may deem erroneous, but he can not abandon the case; he is in court and must remain till the cause is finished. He has the right to tender as many defenses as he has. If the court erroneously deny him one, he must avail himself as best he can of those remaining. He, however, advises the court and his adversary of his claim, and if he submits, as he is bound to do, to the rulings of the court, and tries his case in accordance with the judgment of the trial court, on what principle is he estopped from complaining of the action of the trial court and his adversary in forcing him to fight the battle upon the ground selected by them? We see no element of estoppel in such a case."

Tested by this rule, we do not think the defendant is estopped from urging here that the court tried the case upon a false theory, for on the very threshold of the trial it denied the right of the plaintiff to recover, because he had alleged no cause of action, but this objection was overruled and the defendant was thereby compelled to accept the false issue tendered.

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The evidence in the case shows conclusively that defendant was prepared to receive and ship the plaintiff's cattle on the thirteenth day of September in time for their arrival at Chicago for the Friday's market following, according to schedule time, but that plaintiff refused to ship them unless defendant's agent would guarantee their arrival at said market on said day. The agent refused to do so, and the plaintiff returned them to his farm. As has been said, it could make no difference with plaintiff whether defendant received and shipped the animals at one o'clock or later, provided they arrived in Chicago in time for Friday's market. The essential element of time was not as to any particular hour of the day of the thirteenth of September, when the cattle should be started on their journey, but it was essential only that they should arrive in Chicago in time for Friday's market. Had plaintiff, therefore, properly brought before the court the issue he was attempting to raise, he was not entitled to recover, for the reason stated, that the starting time from Lathrop to market was not essential, but the time of arrival alone was. If the plaintiff was not entitled to recover upon his own petition, he was certainly precluded from recovering under the defendant's answer, for all the evidence plainly showed that the defendant was prepared, at the time it offered to receive and ship the cattle, to have within its scheduled time, transported them to Chicago for Friday's market. The agreement pleaded by the defendant and the alleged breach of the one by the plaintiff were both in the nature of covenants that the cattle would, at the time agreed upon, be delivered. If the plaintiff had permitted the defendant to receive and ship his cattle at the time defendant offered to do so, according to the usual custom, they would have arrived at their destination for Friday's market. Had they not so arrived, the plaintiff would have had his remedy on the contract, for damages caused thereby. The evidence showed in the most conclusive manner, that the defendant was prevented

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from compliance with his contract by the act of the plaintiff.

The conclusion is reached upon a review of the whole case, that the plaintiff, as a matter of law, was not entitled to recover on his petition, and under the law and proof, was not entitled to recover under the contract set out in the defendant's answer.

Cause reversed.

DISSENTING OPINION.

SMITH, P. J.—After this cause was first argued and submitted I wrote an opinion as that of the court affirming the judgment, but as my associates became dissatisfied with it the foregoing opinion was written by one and concurred in by the other, in which a conclusion is reached at variance with that expressed by me and to which latter I feel constrained to still adhere.

I must think that this opinion of the majority results from a misconception and misapplication of the rule of express aider—a rule of pleading, both under the code and common law, which is to the effect that an omission to state a material fact may be supplied by the pleading of the other party (Bliss on Code Plead., section 437; McQuillan on Pld., section 470) as, for example, where the allegations of an answer aids a defective petition it accomplishes all that could be done by an amended petition. Stivers v. Horne, 62 Mo. 473; Mohney v. Reed, 40 Mo. App. 99; Allen v. Chouteau, 102 Mo. 309. As illustrative of this rule, the following are some of the cases that may be referred to: Bank v. Pettit, 85 Mo. App. l. c. 503; Ins. Co. v. Tribble, 86 Mo. App. 546; Donaldson v. Butler County, 98 Mo. 163; Hughes v. Carson, 90 Mo. 399; Henry v. Sneed, 99 Mo. 407; Garth v. Caldwell, 72 Mo. 622; Kercheval v. King, 44 Mo. 401.

The petition in the present case alleged the existence of a contract and a breach thereof, but omitted to allege its provisions. The answer admitted the exist-

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ence of the contract and set forth its provisions and thereby supplied the omissions of the petition. The replication admitted the allegations of the answer as to the provisions of the contract. The legal effect of this, under the operation of the rule of express aider, was not different than if the plaintiff had amended his petition, incorporating therein the omitted allegations.

The answer denied the breach of the contract so pleaded and thus raised the only issue of fact in the case. That issue was submitted to the jury under proper instructions, and its verdict thereon, in my opinion, ought not to be disturbed.

PRESLEY F. EDWARDS, Defendant in Error, v. 97 108
MISSOURI, KANSAS & TEXAS RAILWAY 100 35
COMPANY, Plaintiff in Error.

Kansas City Court of Appeals, December 1, 1902.

1. **Waters and Water Courses:** SURFACE WATER: OVERFLOWING STREAM: ACTION. Waters overflowing the banks of a stream are surface water, but one obstructing the natural flow of water in a stream and thereby occasioning overflow is liable for the resulting damages.

2. ———, ———: ———: ———. Evidence in the record is reviewed and found sufficient to send to the jury the question as to whether the defendant railroad had obstructed a stream passing under its track by a piling bridge so as to cause an overflow.

3. **Trial Practice:** ABANDONED COUNTS: JUDGMENT: COSTS. Where there are several counts in a petition and by subsequent pleadings some are abandoned and on the trial others are dismissed, the defendant is entitled to judgment on such counts and the plaintiff should be taxed with the costs incident to such counts and preparation for trial thereon.

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Error to Boone Circuit Court.—*Hon. John A. Hockaday,* Judge.

Reversed and remanded *(with directions).*

C. B. Sebastian and *Geo. P. B. Jackson* for plaintiff in error.

(1) The overflow complained of was occasioned by surface water resulting from excessive rainfall. The defendant was not liable for such damage. McCormick v. Railroad, 57 Mo. 433; Abbott v. Railroad, 83 Mo. 271. (2) Waters overflowing the banks of a stream are to be regarded as surface water. Abbott v. Railroad, 83 Mo. 280; Shane v. Railroad, 71 Mo. 248. (3) In the absence of negligent construction, defendant is not liable for overflow caused by the location of its railroad. 3 Elliott on Railroads, sec. 937; 1 Rorer on Railroads, 313; Clark v. Railroad, 36 Mo. 202; Munkers v. Railroad, 60 Mo. 334; Benson v. Railroad, 78 Mo. 504; Abbott v. Railroad, 83 Mo. 271; Jones v. Railroad, 84 Mo. 151; Moss v. Railroad, 85 Mo. 86; McCord v. Railroad, 21 Mo. App. 92. (4) There was no legal evidence upon which to submit the case on the theory of the plaintiff's instruction. Gurley v. Railroad, 104 Mo. 211; Baker v. Railroad, 122 Mo. 593; Kelsay v. Railroad, 129 Mo. 376; Nugent v. Milling Co., 131 Mo. 252; Hook v. Railroad, 162 Mo. 569; McLachlin v. Barker, 64 Mo. App. 522. (5) The court committed further error in refusing to enter judgment finally disposing of all the counts of the petition. Needles v. Burk, 27 Mo. App. 211; s. c., 98 Mo. 476; Boeger v. Langenburg, 97 Mo. 390. (6) The court also erred in overruling the motion to tax against the plaintiff the costs pertaining to the four counts on which plaintiff failed to recover and in taxing such costs against defendant. R. S. 1899, sec. 1547; Dupont v. McLaran, 61 Mo. 502.

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E. W. Hinton and *W. H. Truitt, Jr.,* for respondent.

(1) There is no occasion for the respondent to controvert the general proposition that the excess water which escapes the banks of the stream because of the lack of capacity to carry it off, becomes surface water, for the consequences of which no liability attaches. But there is nothing in that doctrine which sanctions the obstruction of a stream so as to force the water out of banks. Brink v. Railway, 17 Mo. App. 177. (2) The costs were rightfully taxed against the defendant. R. S. 1899, sec. 1547; Harrington v. Evans, 49 Mo. App. l. c. 377. (3) It was the imperative duty of the court to tax all costs against defendant. Redman v. Thomas, 39 Mo. App. 143. (4) The filing of the amended petition by plaintiff was an abandonment of all previous petitions. Kortzendorffer v. St. Louis, 52 Mo. 204.

SMITH, P. J.—It may be seen by reference to 82 Mo. App. 96, that when this cause was here on a former appeal the petition was in five counts, the first of which was to recover the value of a strip of ground on which was located the defendant's right of way alleged to have been wrongfully and permanently appropriated. The second was to recover the damages sustained to the plaintiff's land not so appropriated by reason of its being intersected by said railway. The third was for the unskillful and careless location and construction of the line of said railway and the bridges and culverts thereon so as to alter and impede the flow of water across the plaintiff's land, causing the water to overflow and stand upon a large portion of the land and render the same unfit for cultivation. The fourth was to recover damages for the injury occasioned by such overflow in the year 1893, and the fifth count was to recover damages occasioned by such overflow in the year 1894.

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There was a trial on these counts resulting in a verdict for plaintiff on all of them except the fourth, upon which it was for defendant; and in accordance with these several verdicts the judgment was given. On the appeal taken by plaintiff we reversed the judgment and remanded the cause.

After the cause was so remanded the plaintiff filed a third amended petition, omitting therefrom the first, second and fourth counts contained in his former petition and retaining only the third and fifth—denominated in the amendment first and second counts.

The answer to the petition thus amended was a general denial. There was a trial and at the conclusion of the evidence the plaintiff dismissed as to the first count leaving only the second—the same as the fifth in the original petition. The verdict was for plaintiff on that count and defendant appealed.

The record brought before us by the present appeal discloses about these facts, namely: that defendant's railway from Jefferson City west to Boonville is located on the north shore of the Missouri river and over and along the valley of that river, skirting as near as practicable the base of adjacent bluffs and hills. The line of this railway between the two terminal points just named passes through the land of the plaintiff. There is a small stream called "Lindsay's Branch" starting back in the hills; it runs south nearly two miles to where it enters the Missouri river valley and there, after deflecting a little eastward, resumes its southerly course across a crescent-shaped piece of plaintiff's land lying between the bluffs and the defendant's railway track, passing under defendant's track and from thence into plaintiff's fields, lying on the south side of such track, a few hundred feet to a point from which it turns west and after going a half mile finally unites with the Bonne Femme.

The defendant's track for some considerable distance east and west of where it crosses Lindsay's branch is laid on an embankment composed of mould, sand, etc., which is from a foot and a half to two feet

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high. There was a piling bridge across the stream on which the defendant's track rested. It is supported by a row of piling driven into the ground and extending diagonally across the center of the stream. From the bottom of the bridge to that of the stream is about five feet. The width of the stream for two hundred feet above the bridge varies from five to ten feet and the top of its banks are about five feet above its bottom. Its flowage basin covers about six or seven hundred acres. Along its course are occasional springs which are discharged into it and which supply it with some water most of the time.

A few hundred feet north of the railway track the county road crosses the stream on a wooden bridge. About one hundred acres of the plaintiff's land abuts against the railway track on the south, on either side of the bridge. A reference to the following map will assist in understanding the foregoing description of the *locus in quo*:

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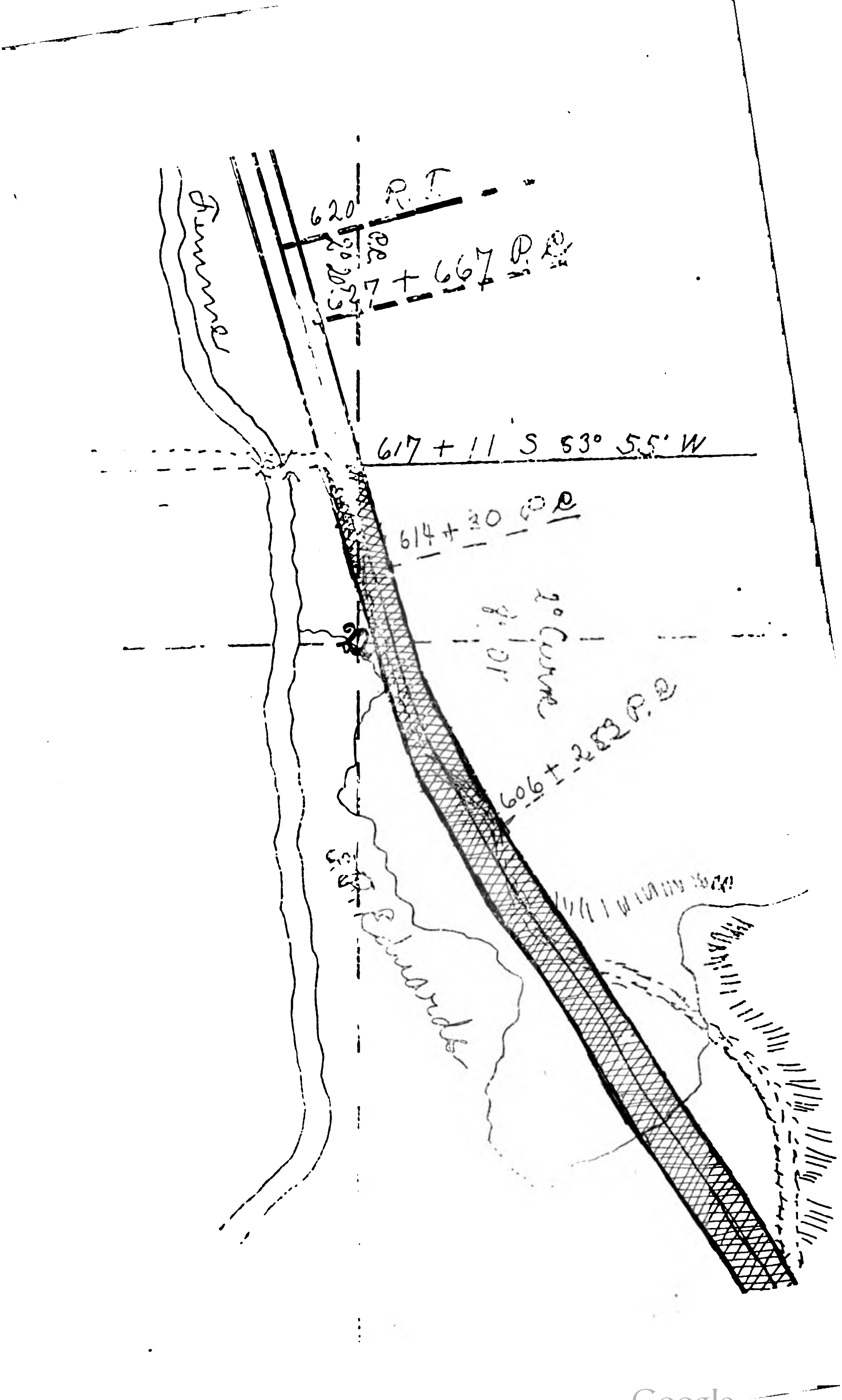

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There was a heavy rainfall on the twentieth of May, 1894, over the flowage basin of the stream and an immense volume of water collected in it. Timber, brush, leaves and trash were carried into and borne along on the surging current until the piles under the bridge were encountered when it stopped and there formed a drift which obstructed the onward flow. The result was that the water accumulated in the stream until it overflowed the land on either side of it for some distance. The spongy, porous railway embankment against which it was carried by the force of gravitation being too weak to withstand the pressure, gave way when it rushed onward carrying the material composing such embankment with the logs, brush and trash out upon the fields of the plaintiff and depositing them there. The consequence was that forty or fifty acres of growing timothy and clover were totally destroyed by the overflow and consequent deposit.

The law is well settled in this State that waters overflowing the banks of a stream must be regarded as surface water. Abbott v. Railway, 83 Mo. 280; Shane v. Railway, 71 Mo. 248. But in Brink v. Railway, 17 Mo. App. 177, where the overflow complained of was occasioned by the negligent act of the defendant in obstructing the natural water of a stream, it was held there was liability. And to the same effect is Munkres v. Railway, 72 Mo. 514. So the question in the present case is whether or not the overflow damaging plaintiff was occasioned by a negligent act of the defendant in obstructing the natural water of a stream.

It is not to be disputed that Lindsay branch is a natural stream or waterway; and it follows that if, as we think, the evidence tends to show the act of the defendant in placing the piles under its railway bridge in the center of that stream in such a way that when great rains fell in the basin of the stream the volume of the water to be carried off was greatly increased so that the drift brought down from the hills by the current was caught and stopped by the piles and a dam or "rack heap" was thereby formed above the bridge

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which obstructed the further passage of the water and caused it to accumulate until it overflowed the banks of the stream, this constituted negligence for which there was liability if damage resulted. The evidence is ample to show that the "logs, brush and trash" brought down the stream were caught against the piles and formed an obstruction that prevented the water from flowing further. The physical conditions which presented themselves after the flood subsided showed that the water which was caused by the obstruction to accumulate above the bridge and along the railway track became for the nonce "dead water" and the logs, stumps, brush and trash which had been brought down by the current of the stream remained there stationary until the railway embankment gave way, when they were carried further on by the moving flood. And the fact that a part of the county bridge was found in the drift that had collected against the railway bridge piles does not conclusively prove that the obstruction did not occasion the overflow. It may have been that after the overflow took place there was still water enough flowing through the railway bridge opening to cause a sufficient current to that point to carry the floating county bridge to where it lodged.

The testimony of the witnesses who had been familiar with the stream and its varied conditions for the last forty years was that they had never known it to overflow its banks above the railway bridge until after it was obstructed by the bridge piling. The consideration of this branch of the case has already been extended to a point beyond which we may not go, so that we must content ourselves with stating that it is our conclusion that the evidence was sufficient to justify the submission of the issue to the jury, and that, therefore, the trial court did not err in denying the defendant's demurrer to the evidence.

The plaintiff by filing his third amended petition in which only two of the five counts of his original petition were retained thereby abandoned the several causes of action stated in those counts. His action as

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to such counts was in effect a dismissal. And as he dismissed as to the first count of his amended petition, the defendant was entitled to a judgment on each count so disposed of according to the fact. Either the plaintiff or defendant or both of them may have had witnesses subpoenaed to prove or disprove the issue tendered by such counts, and if so, the plaintiff and not the defendant should pay the cost due the officers issuing and serving the subpoenas for such witnesses as well as the fees of the witnesses themselves; and the defendant was entitled to a judgment to that effect.

Without indicating our opinion as to what would be the effect of a judgment on the abandoned or dismissed counts, it is sufficient to say that the defendant was entitled to the same.

We shall, therefore, reverse the judgment and remand the cause with directions that judgment be given for plaintiff on the second count of the third amended petition in accordance with the verdict of the jury, and that judgment be entered for defendant on each of the counts abandoned or dismissed in accordance with the facts and on the fourth count in the original petition in accordance with the verdict returned at the first trial, as well as for the costs that accrued thereon. All concur.

SAMUEL K. BEALL, Respondent, v. CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Railroads:** KILLING STOCK: STOPPING TRAIN: EVIDENCE. In an action to recover damages for killing stock at a public crossing, if it is shown that the train could be easily stopped without endangering it after the engineer saw the cattle on or near the crossing, the plaintiff makes his case.

2. ———: ———: CONTRIBUTORY NEGLIGENCE: VERDICT: APPELLATE PRACTICE. Where the question of plaintiff's contributory negligence is fairly submitted to the jury, the appellate court accepts the verdict as found.

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Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis*, Judge.

AFFIRMED.

F. Houston for appellant.

(1) Courts will not allow a verdict to stand when it is clearly contrary to the evidence and a manifest mistake—ignorant or willful. Borgraefe v. Knights of Honor, 22 Mo. App. 127; Doty v. Steinberg, 25 Mo. App. 328. Nor when it can only be accounted for on the ground that it was the result of bias, prejudice, ignorance, or misunderstanding. (2) "Where there is no opportunity for one party to become aware of the negligence of the other, and the injury is caused by the concurrent and co-operating negligence of both, it is well settled that no action will lie." Hudson v. Railroad, 101 Mo. 31-32; Corcoran v. Railroad, 105 Mo. 406; Beach, Contributory Negligence (last Ed.), pp. 180, 183.

H. C. Wallace and *Alexander Graves* for respondent.

(1) The evidence abundantly supports the verdict; and the action of the court regarding instructions was right. Buster v. Railroad, 18 Mo. App. 580; Kendig v. Railroad, 79 Mo. 208; Igo v. Railroad, 38 Mo. App. 378. (2) The appellant failed to establish the plea of contributory negligence. The question was fairly submitted to the jury by appellant's instructions and was found against appellant. Gratiot v. Railroad, 116 Mo. 459; Tabler v. Railroad, 93 Mo. 79; Norton v. Ittner, 56 Mo. 351; Huhn v. Railroad, 92 Mo. 440; Mannerman v. Siermest, 71 Mo. 101; Nagel v. Railroad, 75 Mo. 653; Keim v. Company, 90 Mo. 314; Raddy v. Railroad, 104 Mo. 235; Buesching v. Company, 73 Mo. 219; Petty v. Railroad, 88 Mo. 306; Blanton v. Dodd, 109 Mo. 65; Weller v. Railroad, 120 Mo. 635; McNown v. Railroad, 55 Mo. App. 591.

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ELLISON, J.—This action is based on a claim for damages resulting from one of defendant's trains killing and injuring a lot of plaintiff's cattle at a public crossing in Lafayette county. The judgment in the trial court was for plaintiff.

It appears that plaintiff and two assistants were driving a number of cattle along the highway from Odessa to plaintiff's home when, as they were crossing defendant's railroad track, one of its passenger trains, running at about the speed of forty miles per hour, ran over several of the cattle. The negligence charged was that defendant's engineer saw the cattle, or could have seen them, in time to have avoided the collision. It was shown that there was a whistling-post eighty rods from the crossing and that the whistle was sounded at that point and that immediately thereafter the stock-alarm whistle was sounded and kept sounding up to the point of collision. It was further shown that the cattle could be seen approaching the crossing and so near thereto as to make it certain that they would be on the track at the time the train would get to the crossing. This, of itself, was sufficient on the point of the cattle being seen by the engineer. But there was other evidence of a more direct nature. It was then shown that the distance was such, considering the grade and the condition of the track, that the train could have been easily stopped without endangering the passengers. Buster v. Railway Co., 18 Mo. App. 581; Spencer v. Railroad, 90 Mo. App. 91. The showing of these things fully sustained plaintiff's case.

There is not much room shown for defendant's claim of contributory negligence; but however that may be, the question was fully submitted to the jury and we accept the verdict as final. McNown v. Railroad, 55 Mo. App. 591. No reason exists for interfering with the verdict and the judgment will therefore be affirmed. All concur.

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WESTERN REALTY COMPANY, Respondent, v. GUY L. MUSSER et al., Appellants.

Kansas City Court of Appeals, December 1, 1902.

1. **Title**: PRINCIPAL AND AGENT: EVIDENCE. S. purchased a newspaper through her agent, who subsequently leased it and made a chattel mortgage to and rented a room of defendant's intestate. The evidence attending these transactions is reviewed, and it is *held* that the agent acquired no title which was solely in S. and that the defendant's intestate by his acts and correspondence recognized S.'s title.

2. **Chattel Mortgages**: FORECLOSURE: RIGHTS OF MORTGAGEE. A mortgagee in an overdue chattel mortgage may maintain replevin for the mortgaged goods without foreclosure.

3. **Principal and Agent**: DEALING WITH GOODS: ESTOPPEL: PLEADING: EVIDENCE. To estop a principal from claiming title against the vendee of his agent on the ground that he was permitting the agent to treat the property as his own, it is necessary that the facts be pleaded and proved.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes,* Judge.

AFFIRMED.

W. S. Herndon and *E. J. Smith* for appellants.

(1) In order for the plaintiff in replevin to recover, there must be a right to the possession, coupled with a general or special property. Stone v. McNealy, 59 Mo. App. 396; Baker v. Campbell, 32 Mo. App. 530; Wright v. Richmond, 21 Mo. App. 270; Leet v. Bank, 141 Mo. 584; Weeks v. Etter, 81 Mo. 375. (2) If Green purchased the property from Ross, either for himself or for Miss Shinn, then, any subsequent transfer of the notes, would carry no right to the property or to its possession. Ball Bros. v. McCray, 45 Mo. App. 373; 5 Am. and Eng. Ency. Law (2 Ed.), page 1021, and note 1.

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Jay L. Carlisle and *F. B. Ellis* for respondent.

(1) The mere naked possession of Miss Shinn was sufficient to maintain this suit. The bare naked possession is sufficient to maintain replevy against one who has no better title to property. Scott v. Riley, 46 Mo. App. 252; Grocer Co. v. Shackelford, 56 Mo. App. 642; Bank v. Wood, 124 Mo. 78.

ELLISON, J.—This is an action of replevin for a newspaper plant consisting of a printing press and other items of property connected therewith. The judgment in the trial court was for plaintiff.

The plaintiff and defendant claim under chattel mortgages given on the property. Plaintiff's claim rests on a prior mortgage given by Burnham and Updyke to Ross. Defendant's claim rests on a subsequent mortgage given by Green to defendant's intestate. The facts appear substantially as follows: Ross owned the paper and sold it to Burnham and Updyke who executed to Ross three notes, one first due for $400 and two others for $500 each, and a chattel mortgage on the property to secure them. Ross assigned these notes to Gage as collateral for borrowed money. Burnham and Updyke failed to pay the note first due and Ross, through his agent, Smith, took possession under his mortgage and becoming dissatisfied with Smith he put William Henry in charge. Henry, as agent for Ross, then sold the property to Green as agent for Miss Shinn. Henry took the purchase money and paid Ross's debt to Gage and received from the latter the Burnham and Updyke notes which he held as collateral for Ross's debt. Henry then delivered them over to Green who indorsed them to Miss Shinn for whom he had purchased the property. Green leased the newspaper for a time from Miss Shinn, when he quit and turned the keys to the building over to her and, as stated by witnesses, left the country. She rented a building from defendant's intestate, Musser, in which the property was kept, and afterwards sold it to this plaintiff. As tending

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to prove the acts of ownership by Green it was shown that he was in possession and published the paper and that he gave a mortgage to Musser, defendant's intestate. That he brought a replevin suit for possession against Smith, and purchased some printing material. It was furthermore offered to show that he published in the paper that he had bought it. This was excluded, but, in considering the case, we will assume that it was admitted.

Many points are presented in support of the appeal, including several objections to the instructions given for plaintiff. But as we regard evidence which prominently appears in the cause and which is uncontradicted as determining the case in plaintiff's favor the judgment could not have been otherwise than it is and we need not enter into a discussion of such points.

Ross is the source of the title through which each of the parties to the controversy claim. Neither side disputes his title. Plaintiff claims that Miss Shinn bought of Ross through her agent Green; and that she then sold to plaintiff, and that is what we have just stated the facts to be. But defendant claims that Green bought of Ross for himself and that he was not Miss Shinn's agent, and that he then mortgaged the property to defendant's testator. So, then, casting aside all question about Ross's title, and about the filing or recording of the Burnham and Updyke mortgage, we are confronted with the simple question whether Green bought the property as Miss Shinn's agent, or whether he bought it for himself. On this question the evidence when properly analyzed points to the one conclusion that he bought it for Miss Shinn. There is not a particle of evidence to the contrary. The proof was that witness Judge Henry conducted the sale as agent for Ross and that he sold to Green; whether he regarded Green as agent for Miss Shinn or as purchasing for himself can make no difference, though it is plain to be seen that he thought Green was acting as agent. The question, though, is, who was Green in fact acting for?

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—not what Henry thought about it. Miss Shinn testified that he was acting for her and that she paid the purchase price of the property by her check. Henry cashed her check and with the money took up Ross's note to Gage and received from Gage the two Burnham and Updyke notes to Ross held by him as collateral. He delivered them to Green who thereupon indorsed them over to Miss Shinn without recourse. Green himself is not produced and from no source is it shown that he ever had any title. He was in possession of the property as a lessee of Miss Shinn, but that, of course, did not give him a title. He turned back the possession to Miss Shinn by giving her the key to the building in which the property was kept and the paper published. She then rented the building of defendant Musser at $8 per month and paid him the rent up to her sale to this plaintiff. This clear act of recognition of Miss Shinn's claim can not be reconciled with any prior right of Musser. He testified that he regarded the building as worth $15 and that he recognized that she had an interest in the property as well as himself and that she should therefore pay some rent for the building in which the property was situated. But this is wholly inconsistent with the manner of his act of renting to her. She wrote him on January 4, 1901, in which she stated that she was in possession and charge of the plant and had the key to his building; that she could not afford to pay him more than eight dollars a month rent; that she had another building offered her for five dollars but would take his rather than move the "plant." She added: "I enclose check for $8 for this month's rent. If you can not accept that as this month's rent in full, I will have to move the plant to a cheaper room. If you accept this, please sign this receipt and return to me." Musser then sent her a receipt with the following letter without any suggestion that he claimed possession or interest in the property: "Yours at hand. I will accept eight dollars per month until plant starts up. Then I want ten dollars per month. Green rented from 15th of each month. Did you want to

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begin the 15th or not?" Receipts for each successive month's rent then followed for six months up to Miss Shinn's sale to plaintiff, without any suggestion of claim of joint possession or ownership or interest. It is altogether beyond reason to suppose that he occupied such status. The *fact is* that *he himself* fixed his status just the contrary.

It is true that when Smith refused possession of the property after Miss Shinn's purchase, Green brought an action of replevin therefor which went off by default. But that was because he was lessee and was to operate the plant and Miss Shinn paid all expenses.

It does not appear in the record that there was ever any foreclosure of the chattel mortgages. But that would make no difference, since a mortgagee in an overdue mortgage may maintain replevin.

We are satisfied that the uncontradicted evidence shows title in Miss Shinn and that she was in possession thereunder at time of sale to plaintiff. And we are further satisfied that there is no evidence upon which to base a claim of title in Green. And in stating this we are not unmindful that it is a part of defendant's claim that Miss Shinn permitted Green to deal with the property as owner, thereby leading defendant to believe he was, and that she was therefore, in justice, now estopped to say he was not. There are two answers to this contention. It was neither pleaded, nor proved; estoppel is a defense which must be set up by answer.

The proof offered by way of a single statement in the newspaper was not sufficient. The record disclosing affirmatively that Miss Shinn had the prior claim to the property and that Green had none, the judgment was the only one that would be permitted to stand, and it is consequently affirmed. All concur.

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GEORGIE SHANNNON, Respondent, v. OLLIE SHANNON, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Divorce:** MAINTENANCE OF CHILDREN: LIABILITY OF FATHER. Where a decree of divorce is silent as to the custody of children and the father leaves them to the care and nurture of his former wife, his liability for their support and education remains just as before the divorce. (Cases reviewed.)

2. ——: ——: ——: ACTION. Where after divorce the father abandons his minor children to the care and maintenance of the mother she can compel him to relieve her of such burden, and although the proceeding is in the interest of the children, yet the primary cause of action is in the mother.

3. **Parents and Children:** LIABILITY OF PARENTS: RIGHTS OF CHILDREN. Children are not parties to the quarrels of their parents, and they lose no rights thereby.

4. **Divorce:** MAINTENANCE OF CHILDREN: LIABILITY OF FATHER: SUPPLEMENTAL PROCEEDING. Where parents have been divorced the wife may, after birth of an infant, by a supplemental bill open up the decree as to such after-born child, and the court may make all suitable orders for its care, custody and maintenance.

Appeal from Clay Circuit Court.—*Hon. J. W. Alexander,* Judge.

Affirmed.

W. J. Courtney and *F. B. Ellis* for appellant.

(1) Suits by infants can only be commenced by guardian and curator of such infant, or by next friend, appointed for him in such suits. Sec. 550, R. S. 1899; R. S. 1899, sec. 555. (2) A separate action for maintenance of minor children, subsequent to a decree of divorce, can not be maintained. Hickman v. Hickman, Ohio, 9 Weekly Law Bul. 55; Harris v. Harris, 5 Kan. 46; Hampton v. Allen, 56 Kan. 46; Rumsey v. Rumsey, 121 Ind. 215. (3) It is the duty of the father to sup-

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port his children; this duty is paramount. But where they are divorced, and subsequently a child is born, it is then as much the duty of the mother to support such child as the father; the father's duty in such case is not exclusive. Harris v. Harris, 5 Kan. 46. (4) Where the care and custody of the child is with the mother, the father is not liable for money outlayed by the mother for its support, notwithstanding the father is primarily liable for the support of his minor child. Chester v. Chester, 17 Mo. App. 657. (5) Where the mother has the care and custody of the child, the father can not be compelled to support it, where there is a decree divorcing the father and mother, The father must have the care and custody of the child. Finch v. Finch, 22 Conn. 411; Husband v. Husband, 67 Ind. 583; Corhman v. Hasler, 82 Iowa 295; Brow v. Brightman, 136 Mass. 187. (6) Alimony, under our statutes, can only be decreed to the successful party in a divorce suit. McIntire v. McIntire, 80 Mo. 470.

Sandusky & Sandusky and *A. A. Whitsitt* for respondent.

(1) The father is by statute primarily the guardian of his children, and is charged with the care of their person, education and support. R. S. 1899, sec. 3478. (2) He is also under the same obligation by common law. 2 Kent. Com., side p. 190; R. S. 1899, sec. 2926; R. S. 1899, sec. 2932. (3) The children are not parties to the quarrels of their parents and they lose no rights thereby, hence, the father's duty to maintain them remains after divorce as before. 2 Bishop M., D. and S., sec. 552. This court has held this to be true regardless of who has the custody of their children. Chester v. Chester, 17 Mo. App. 657; Lusk v. Lusk, 28 Mo. 91. (4) Where nothing is said in the decree of divorce as to maintenance, the duty of supporting the child is still on the father, though the care and custody of the child be in the mother. Keller v. St. Louis, 151 Mo. 597; Lusk v. Lusk, 28 Mo. 91; Conn v. Conn, 57 Ind. 323;

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McCarthy v. Hinman, 35 Conn. 538; Milford v. Milford, L. R. 1 P. & D. 715; 2 Bishop M., D. & S., sec. 552; In re Kohl, 82 Mo. App. 442; State ex rel. v. Court of Appeals, 99 Mo. 216, and cases cited. (5) A decree of divorce would necessarily affect the welfare of the child, and it is the duty of the court to protect it, and hence it is that the court can make a proper order concerning its future custody though the petition contains no prayer to that end. In re Gladys Morgan, 117 Mo. 249; 10 N. J. Eq. 261. (6) In an action for divorce, the court may, during the pendency of the action, or at the final hearing, or afterwards, make such order for the support of the wife, maintenance and education of the children of the marriage, as may be just, and may at any time thereafter annul, vary or modify such order as the interest and welfare of the children may require. Chester v. Chester, 17 Mo. App. 660; Wilson v. Wilson, 45 Cal. 403; Angus v. McKay, 40 L. R. A. 585; 2 Bishop M. and D., sec. 1220; Courtright v. Courtright, 40 Mich. 633; In re Tillery, 40 L. R. A. 579. (7) When the decree gave custody of infant to the mother, held that this did not relieve father from support; that he was bound to maintain them as long as they were too young to earn their own livelihood; and a court of chancery will at subsequent term, entertain the petition of the mother to recover her reasonable advances, and for an order tor future support. Finch v. Finch, 22 Conn. 428; Holt v. Holt, 42 Ark. 495; Slanton v. Wilson, 3 Day (27 Am. Dec. 255). (8) Where no provision is made for the children at the time the decree of divorce is entered, the mother may at a subsequent term, on petition or motion, obtain an order of the court compelling the father to provide her with means for the future support of the children. Meyers v. Meyers, 91 Mo. App. 151.

BROADDUS, J.—The facts of this case were that plaintiff and defendant were husband and wife prior to the twelfth day of April, 1900, at which time they disagreed and separated; that afterwards the defendant

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herein brought suit in the Clay Circuit Court for divorce, resulting in a decree in his favor divorcing him from his wife; and that soon thereafter—August 9, 1901,—there was born of said marriage a male child; that the divorce was granted on the statutory ground that the wife had been guilty of indignities to the husband; that she did not appear at the trial, the same being ex parte; that as the child was not then born there was no order in the decree of divorce providing for its custody and maintenance; that the respondent, as well as her parents with whom she has resided since the separation, are without sufficient means to maintain and educate the infant, and the appellant herein has contributed nothing for that purpose; and that said appellant is a young man of good business capacity and has a moderate estate in money and other property.

Before the trial the appellant demurred to the petition for various causes, among which were: that the court had no jurisdiction of the defendant or the subject-matter of the action; that the plaintiff had no legal capacity to sue; that the rights of the parties had been adjudicated in said divorce proceedings; and that there was a defect of parties plaintiff. The court overruled this demurrer and after hearing the evidence decreed that defendant pay to plaintiff thirty dollars in advance every three months and awarded the care and custody of the child to the mother.

The same questions are raised on the appeal as were raised on said demurrer. In Rankin v. Rankin, 83 Mo. App. 335, it was held: "Where the defendant obtained a divorce from the plaintiff under a decree making no award of the custody of the children, and which left them to the care and nurture of the former wife, his liability for their support and education remained just as it had existed before the obtention of the decree." That case is similar on the facts with the one under consideration here in this; that the defendant in a former suit had obtained a decree of divorce against his wife in which there was no award of the care and

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custody of two of their children; the judgment was rendered in the State of Texas, where the husband had moved, and while the wife and children were in Missouri where he had left them. In Meyers v. Meyers, 91 Mo. App. 151, it was held: "Where the statute authorized the court awarding the custody of minor children in a divorce to the mother, to make provision in the decree for their maintenance and to change it from time to time, and no such provision is made at the time the decree is entered, the mother may at a subsequent term, on petition, obtain an order of the court compelling the father to provide her with means for its future support." See, also, In re Kohl, 82 Mo. App. 442.

The cases cited, we think, are sufficient authority justifying the proceedings in this case in the name of the mother for the support of the minor, and the right and duty of the court rendering the original decree of divorce, and any other court of competent jurisdiction to make, at a subsequent term or terms, a proper order for the support of the minor. And as the father has abandoned the minor to the care and custody of its mother, and has also imposed upon her the burden of its maintenance as well, which the law imposed upon the father, we can see no good reason why she can not, with the aid of the court, compel him to relieve her of such burden. It is true, in a sense, that the proceeding is in the interest of the infant, but only so indirectly; primarily and directly, the cause of action is in the mother. And as her petition to the court is in her interest, to compel the father, while she is maintaining, caring for and nurturing the child, to perform his share of such duty, a duty not only imposed by the common law, but by the universal custom of all civilized society, good conscience demands that she should be heard. The child was not a party to the quarrels of its father and mother and the decree of divorce did not affect his right to maintenance at the hands of his father. Bishop on Marriage and Divorce, section 552, states the rule: "The children are no parties to the quarrels of the parents, they lose no right thereby." See, also, Chester v.

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Chester, 17 Mo. App. 657. And a divorce does not terminate the father's liability to support his child. Bishop on M. and D., section 1220. It would be a strange rule of law that would absolve the father from such liability when the decree of divorce was silent upon the matter.

The appellant has cited us to two Kansas decisions in support of his contention that the plaintiff is not entitled to the relief asked for. In Harris v. Harris, 5 Kan. 46, the husband and wife were divorced by a Kansas court, at which time they had three children, the custody of which was awarded to the mother. Two days after the decree a fourth child was born. The wife brought an action of debt against the father for the entire support and education of all the children. The court held that she could not maintain the action; and that the only way for relief was by opening the decree as to the children and making such provision for them as might be just under all the circumstances, or by other proper proceedings under or supplemental to the decree. It was also held, as between the father and mother, the duty of maintaining the children was as much that of the mother as the father; but this distinction from the common law was made by reason of a constitutional provision of the State for the equal rights of the wife as of the husband in the possession of their children. With this exception we think the ruling is in harmony with decisions of this State, for it recognizes the right of the wife to compel the husband to contribute to the support of his children "by opening up the decree as to the children or by other proper proceedings under or supplemental to the original bill," which is equivalent to the proceedings in this case. In Hampton v. Allee, 46 Kans. 461, the wife predicated her right to recover for maintenance of the children on a decree of divorce. The action was also for debt. The court held, as there was no liability imposed by the decree, plaintiff was not entitled to recover; or, in other words, she could not recover in that form of action.

In Husband v. Husband, 67 Ind. 583, the court held:

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"The awarding to the mother of the custody of her minor children, on decree granting her a divorce from the father, deprives him of all right to the services of the child, and consequently frees him from all liability to the mother for the care, support and maintenance of the child." This decision was the result of a construction of the statute of that State to the effect that, the court in decreeing a divorce shall make provision for the guardianship, custody and support and education of the minor children of such marriage. Our statute regulating divorce is somewhat different in that it provides that the court may, from time to time, after the original decree, on the application of either party, alter the same as to the allowance of alimony and maintenance. Sec. 2926, R. S. 1899.

In Cushman v. Hassler, 82 Iowa 295, the facts were that the child's parents had been divorced and its care and custody awarded to the father. The child, without cause and without the consent of the father, left him and went to live with his mother. The mother sought to charge the father with the support of the child. The court held that the father was not liable.

In Brow v. Brightman, 136 Mass. 187, it was held that the father is not liable for the support of his minor child under the statute of the State after its custody had been given to the mother by a decree of court. It was further held that under the laws of that commonwealth the defendant, "if of sufficient ability, was under obligation to provide for and support his infant child." And it was also held that, "the remedy to secure such provision for the support of the child as the defendant might have the ability to furnish, was under a decree of this court, which it had ample authority to make, in either of the proceedings before it, as a part of the original decree, *or at any subsequent term*" (italics ours).

In Finch v. Finch, 22 Conn. 411, the court held that where the decree of divorce granted on the application of the wife awarded to her the custody and control of the minor children of the husband and wife, she was not entitled to recover against the father "in action of

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book debt for the entire support and education of such children, furnished by her after such decree had been granted."

This Connecticut case is squarely in conflict with the decisions of this State. The Iowa and Indiana decisions have no application. The Kansas and Massachusetts decisions are in harmony with our own, except the case of Rankin v. Rankin, supra, where the proceeding was not in the nature of a supplemental bill as the one under consideration, but was an original bill in the court of a State different from that in which the decree of divorce had been granted.

We are satisfied that the weight of authority and reason is that the court in which the decree of divorce was granted has the power at a subsequent term, by motion or by supplemental bill, to open the decree as to the minor children of the parties to the suit, and to make suitable orders for their care, custody and maintenance. The policy of the law is to protect the progeny of unfortunate marriages, and while such is the case, great care should be exercised by the courts in so doing, to do no injustice to either parent and to as far as possible make such orders as will not impose a burden upon either not in harmony with justice and good conscience.

An examination of the record in the cause before us has convinced us that the court below, in its judgment, was guided by sound discretion, and that no burden was cast upon defendant other than that imposed by the common law. Cause affirmed. All concur.

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TILLIE BERGER, by Next Friend, Respondent, v. CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 1, 1902.

1. **Evidence:** CONTRADICTION OF PHYSICAL FACTS: IMPROBABLE ACTS. While the facts in evidence in this record are improbable, they are not a contradiction of physical facts and the doctrine of Hook v. Railway, 162 Mo. 569, does not apply.

2. ———: REBUTTAL: COURT'S DISCRETION. Plaintiff's evidence tended to show that she was riding in the smoking car; defendant's, that she was in the chair car. In rebuttal the court permitted parties who were in the chair car to testify that they did not see plaintiff in that car. *Held,* not an improper exercise of the court's discretion.

3. **Passenger Carriers:** DAMAGES: PUNITIVE. Under the evidence in this cause the question of punitive damage was properly submitted to the jury.

4. ———: ———: MEASURE OF: SHAME: EVIDENCE. Specific proof of mental anguish and humiliation is not necessary as they may be inferred sufficiently from the evidence which discloses the nature, character and extent of the injuries.

5. **Evidence:** UNASSAILED GENERAL REPUTATION: PASSENGER CONDUCTOR. Evidence of the general reputation of parties to a forensic proceeding is not competent for the mere purpose of raising presumptions favorable to one party or disadvantageous to another; so where the allegation is that the conductor struck the passenger, evidence of his general reputation, and his general conduct toward ladies especially, is not competent so long as such reputation is unassailed.

Appeal from Howard Circuit Court.—*Hon. John A. Hockaday,* Judge.

AFFIRMED.

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F. Houston and *C. C. Madison* for appellant.

(1) The plaintiff's story was so improbable and contradictory in itself and the weight of evidence was so overwhelmingly against it that the demurrer should have been sustained. The very construction of the vestibule renders her story impossible. The statement of a witness which, from the nature of things, could not be as said, will be treated as unsaid. And it was the duty of the court under this evidence to give the peremptory instruction asked. Hook v. Railroad, 162 Mo. 569. (2) The court erred in excluding the testimony of witness Barton as to the character, disposition and general reputation of conductor Drake, and as to his general conduct toward passengers and ladies especially, and also the evidence of Drake himself and of the porter with the same purport. The very essence of this petition is that the conductor "wrongfully, unlawfully, maliciously and wantonly assaulted, pushed, shoved, insulted and ejected plaintiff from said train while the same was in motion." Best's Principles Ev. (Am. Ed.), secs. 256-7-8; Scott v. Fletcher, 1 Tenn. (Overt.) 488. (3) The court erred in giving respondent's third instruction for exemplary damages. "The wrong must be done with evil intent." Sedgwick Dam. (8 Ed.), secs. 363, 369, 383; Lewis v. Jannoupoulo, 70 Mo. App. 329; Leahy v. Davis, 121 Mo. 232; Barnett v. Railroad, 75 Mo. App. 446. Mere indecorous conduct in expelling a passenger is not sufficient cause for the infliction of punitive damages. Sedgwick Dam. (8 Ed.), sec. 365-6, citing 85 Ky. 307. (4) The court erred in giving respondent's second and third instructions. There were no allegations of "shame and humiliation" in the petition. Nor was any evidence offered to prove any. The instructions must have pleadings as their basis. Jacquin v. Cable Co., 57 Mo. App. 320. (5) The court erred in admitting the testimony of Adeline Johanning, as evidence in rebuttal. This was evidence in chief. From the outset the question of which car the Berger women were in, was a material question.

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Percival Birch and *Sam C. Major* for respondent.

(1) The court committed no error in refusing defendant's instruction 1. If there is any evidence it must go to the jury who are exclusive judges of its weight and sufficiency. Chamberlain v. Smith, 1 Mo. 482, and all cases following and approving same. A jury is never bound to believe a witness or witnesses. Hadley v. Orchard, 77 Mo. App. 141; Gannon v. Gas Co., 145 Mo. 502; Keown v. Railroad, 141 Mo. 86; Baird v. Railroad, 146 Mo. 265. (2) The fact that the conductor had never before this pushed or knocked any one off the train could have no bearing in this case, and was clearly incompetent. (3) The third instruction given at the instance of plaintiff for exemplary damages, correctly declares the law, and should have been given. Goetz v. Ambs, 27 Mo. 28; Green v. Craig, 47 Mo. 90; Freidenheit v. Edmundson, 36 Mo. 226; Arnold v. Savings Co., 76 Mo. App. 159. (4) It is within the discretion of the jury as to whether or not punitive damages will be allowed in any case. Carson v. Smith, 133 Mo. 606; Callehan v. Ingram, 123 Mo. 372; Nicholson v. Rogers, 129 Mo. 136; 1 Sedgwick on Damages (8 Ed.), sec. 387; 2 Thompson on Trials, sec. 2065; Brown v. Plank Road Co., 89 Mo. 152; Morgan v. Durfee, 69 Mo. 469; Fulkerson v. Mudeck, 53 Mo. App. 151; Carson v. Smith, 133 Mo. 617. (5) No distinction as an element of damages, is made between other forms of mental suffering and that which consists of a sense of wrong or insult. 8 Am. and Eng. Ency. of Law (2 Ed.), p. 668, and authorities there cited; Hertpence v. Rogers, 143 Mo. 623; Brown v. Railroad, 99 Mo. 310; Baldwin v. Boulware, 79 Mo. App. 5. (6) The testimony of Adeline Johanning was competent.

BROADDUS, J.—This is an action for damages for injury to plaintiff while getting off defendant's train at West Glasgow, Howard County, Missouri, on December 28, 1901. The allegations of the petition are,

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that while the plaintiff, who at the time was a passenger on defendant's train, was in the act of getting off said train at said place of injury, she was struck or pushed by the defendant's conductor which caused her to fall from the platform of the car on which she was standing, to the ground, whereby she was seriously injured, two of her ribs being broken and other hurts sustained. She claimed both compensatory and punitive damages. The defendant's answer consists of a general denial and that plaintiff's injuries were the result of her own negligence and not the act of the defendant. The jury found for plaintiff and gave her $600 compensatory and $500 punitive damages.

The appellant's contention is that the plaintiff's story "was so improbable and contradictory in itself, and the weight of evidence so overwhelmingly against it" that she was not entitled to recover anything. There were only four witnesses who saw the accident, viz.: Rosa Berger, who testified for the plaintiff; the conductor, Drake; the porter, Wilson; and J. D. Selmeyer who testified for the defendant.

The plaintiff's evidence was that she with witness Rosa Berger, her sister-in-law, had got on the train at Glasgow sometime in the afternoon of the day hereinbefore named, for the purpose or returning to West Glasgow, a station near where they lived; that owing to the shortness of the distance between the two stations, defendant's conductor prior to the occasion in controversy had insisted that they ride in the smoker so that it would enable them when they arrived at their destination to get off the train more readily; that on the day in question they took seats in the smoking car and when they arrived at their destination, as plaintiff was passing from the platform of the smoking car to the next car, at the foot of which stood the porter to assist ladies to alight from the car, the conductor met her and said in an angry tone: "you get off here!" and struck or pushed her, which caused her to fall against the side of the car and to the ground below. Rosa Berger, her

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sister-in-law, corroborated her in almost every particular.

The conductor denies having used harsh or angry words, denies having either struck or pushed her and states that plaintiff and her sister-in-law were not in the smoking car, but were in the chair car, and that when she came out of the car he was on the platform of the smoker, and as plaintiff, who was on the platform of the ladies' car at the time, was about to pass him he put his hand on her shoulder and said to her: "No, step down these steps;" that he said and did this in order to have her go down by the porter who was standing on the ground at the steps to which he directed her, so that he could assist her in getting off the train; that she got off safely, but after she got off she seemed to have slipped and fallen on her hands and knees and left side as the porter had hold of her right arm, and the porter helped her up and asked if she was hurt—she answering that she was not. On cross-examination he was asked if when plaintiff fell her body touched the ground, to which he answered: "No, sir, it didn't, for the porter had hold of her right arm and that kept her from falling to the ground."

The porter, Wilson, testified that plaintiff and her sister-in-law were not in the smoking car but in the chair car; that the plaintiff, who was the last to get off the train, fell as she stepped to the ground off the stool; that she did not go all the way down to the ground because he was helping her, having her by the arm with both his hands; that she only fell on her hands and knees.

J. D. Selmeyer, who was a passenger on the train, was in the smoking car and got off the train before plaintiff. He was standing and looking at her when she fell. When he saw her first she was on the last step, at which time she was standing; from this step she fell, at which time the porter was holding out both his hands towards her in which position he still had them when she went down to the ground.

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Dr. Gallemore, a physician and surgeon, testified that the plaintiff had two ribs broken, which he thinks have entirely healed. Plaintiff's testimony was that she suffered greatly and still suffers from her injuries and is not able to perform labor. The plaintiff in rebuttal introduced Adeline Johanning, who was on the train at the time and in the chair car, but did not see plaintiff and her sister-in-law in said car.

We have given enough of the evidence to show its character. If what defendant's witnesses stated in their evidence was true, the plaintiff and her sister-in-law were guilty of deliberate perjury. On the other hand, if they told the truth, the conductor, the porter and Selmeyer were guilty of perjury. This is not a case where witnesses might see the occurrence differently in detail but agree on the main facts; but the difference is radical and irreconcilable.

The plaintiff first stated that the conductor pushed her, and then, afterwards, that he struck her; and other inconsistencies might be pointed out in her evidence. But in that respect defendant's witnesses are equally unfortunate. The conductor is contradicted by the porter, the porter by the conductor; and both by Selmeyer and by Dr. Gallemore. The conductor testified that plaintiff got safely to the ground and then slipped and fell but was prevented from going to the ground by the act of the porter. The porter's evidence was that she fell from the stool while he held her arm with both hands and that her body did not touch the ground; while Selmeyer's testimony is that the porter did not have her by the arm and that she fell to the ground. The physical fact testified to by Dr. Gallemore, a disinterested witness, that two of plaintiff's ribs were broken, was a flat contradiction of both the conductor and porter; for she must have fallen to the ground on upon some solid substance with great force to have produced such a result.

It is presumed that the jury carefully weighed all the testimony and gave to each witness that degree of credit to which he or she was entitled. It is almost in-

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credible that the conductor of defendant's train should have been guilty of the outrage with which he was charged, and there seems to have been no sufficient motive, to say the most about it, for the act.

But this is a case not lacking in proof to sustain the allegations of the petition, but where its unreasonableness is attacked. It is not alike upon principle with that cited by the appellant, of Hook v. Railroad, 162 Mo. 569, where it was held: "Courts will treat as unsaid by a witness that which in the very nature of things could not be as said. The testimony of a witness if in clear contradiction to the physical facts should be disregarded and not submitted for the consideration of a jury, and if so submitted their finding predicated thereon should be disregarded." While the facts testified to by plaintiff and her witnesses may be untrue, they are in no sense a contradiction of the physical facts in the case. They are at most only improbable; but that the improbable and unlooked for do sometimes occur is common experience.

Appellant insists that the action of the court in permitting plaintiff in rebuttal to prove by witness Johanning that she did not see plaintiff in the chair car was error and prejudicial to the defendant. We think not. Although plaintiff stated in her evidence as a fact of her case that she was riding in the smoking car, the defendant's evidence tending to contradict and impeach her testimony, and making that point an issue in the case, clearly justifies the court in permitting plaintiff to fortify herself in that respect by the introduction of corroborative testimony. It was a matter within the sound discretion of the court.

It is also claimed that the court erred in giving plaintiff's third instruction for punitive damages. If plaintiff was entitled to recover anything she was entitled to punitive damages, for the act upon which the cause of action was based was both wanton and malicious, and it is so charged. It is not denied that if the act in question was wanton or malicious it was a case for punitive damages.

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Defendant objects to plaintiff's instruction as to the measure of damages, in which shame and humiliation are included as elements, as there was no evidence that plaintiff experienced either shame or humiliation. A similar question arose in Brown v. Railroad, 99 Mo. 310, where it was held: "It is not necessary to make specific proof of pain and mental anguish. These elements of damage are sufficiently shown by the evidence which discloses the nature, character and extent of the injuries. From such evidence the jury may infer pain and mental anguish." So if defendant's conductor struck or shoved plaintiff so as to cause her to fall off the train the jury might legitimately infer that in consequence thereof she felt humiliation and shame. It would have been natural for her to have experienced such sensations. Nor was it necessary to allege such in her petition. Brown v. Railroad, supra.

The defendant introduced a witness to prove the character and general reputation of the conductor and as to his general conduct toward passengers, ladies especially. Upon objection to the competency of such evidence, the court excluded it. The reputation of the witness had not been assailed and no attempt was made to impeach him in any manner. But we are cited by defendant to certain authorities, among which is Bests' Prin. of Evidence, secs. 2567-8, to sustain the contention that the court committed error in refusing to admit said evidence. In section 257 the author in formulating a rule uses the following explicit language: "According to the general rule, upon the whole a just one, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with a view of raising a presumption either favorable to one party or disadvantageous to his antagonist." Applying this rule, which is according to universal practice in the courts of the State, the action of the court in the matter was right, and not wrong.

For the reasons given, the cause is affirmed. All concur.

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MRS. M. M. THOMPSON, Respondent, v. THE NEW YORK STORAGE COMPANY, Appellant.

St. Louis Court of Appeals, November 25, 1902.

Testimony: COMMON CARRIER: PRACTICE, TRIAL: PRACTICE, APPELLATE. Under the meager testimony in this case bearing on the question we are not prepared to say the trial court erred in holding that the defendant was not a common carrier and entitled to a lien on goods hauled by it as such; especially as no declarations of law defining a common carrier were requested. Defendant's business was the storage of personal property and moving household effects from one part of the city of St. Louis to another.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz,* Judge.

AFFIRMED.

Hiram N. Moore for appellant.

(1) Goods may be held to secure charges due; that is the carrier has a lien to secure his compensation, and the carrier may insist upon retaining possession until those charges are paid. Potts v. Railroad, 131 Mass. 455; Newhall v. Vagras, 15 Maine 314; Pennsylvania Steel Co. v. Railroad, 94 Ga. 636. (2) In Roberts v. Koehler, 30 Fed. 94, the court even goes so far that where a passenger and his baggage are conveyed by the same vehicle, the carrier has a lien against the baggage, not only for the charge of transporting the baggage, but also for the passenger's fare, they both being carried under the same agreement, and the whole lien attaches to each and every article of goods subject to it, and remains attached to whatever part of the property may remain within the possession of the carrier. 114 Mass. 447; Lane v. Railroad, 14 Grey (Mass.) 143; Potts v. Railroad, 131 Mass. 455.

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Thomas L. Anderson for respondent.

The lien of the carrier is lost by the delivery of the goods to the owner. 5 Am. and Eng. Ency. of Law, 411; Rememan v. Covington, 51 Iowa 338; Bailey v. Quint, 22 Vt. 474.

GOODE, J.—Appellant is a corporation whose business is storing and moving goods for hire in the city of St. Louis. Plaintiff hired the concern to move her household effects from one house in said city to another, a contract being made by which the goods were to be hauled in two loads for eleven dollars, an extra dollar above the usual price being charged for overloading. When the vans arrived at plaintiff's residence she refused to pay for the hauling because the top of a table was cracked. Some of the articles were retained by the defendant as security for its charge and this action was brought to recover damages for the conversion of the retained property.

Before the trial in the justice's court defendant paid the accrued costs and tendered the articles to plaintiff on condition of her paying its bill, but the tender was declined and there is evidence to show the goods were damaged while in the defendant's possession.

The defense is that the storage company is a common carrier and had a lien for its charge which entitled it to retain the property until plaintiff paid.

The testimony is meagre but we think appellant was a private carrier or ordinary bailee for hire, not bound to serve every one without discrimination. Faucher v. Wilson, 68 N. H. 338, and cases cited; Megart v. Smith, L. R. 1, C. P. 19 and 423; Piedmont Mfg. Co. v. Railway, 19 S. C. 353; Fish v. Chapman, 2 Ga. 353.

Whether a person was a common carrier, bound by all the extraordinary responsibilities and entitled to the privileges of that class of bailees, can sometimes be known only by particular proof of how his business was

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conducted and what professions he made to the public regarding it. Elkins v. Railway, 23 N. H. 285; Schloss v. Wood, 11 Colo. 287.

As no declarations of law were asked on the subject, and as what testimony there is inclines us to look on appellant as a private carrier instead of refuting any possible inference of that kind, we will not interfere with the finding of the court below.

Some commentators insist that on principle a private carrier should have a lien but say the decisions hold he has none. 5 Am. and Eng. Ency. Law (2 Ed.) 402; Hutchinson on Carriers, (2 Ed.), sec. 46; Fuller v. Bradley, 25 Penn. St. 120; Piquet v. McKay, 21 Black. (Ind.) 465; Riddle v. Railway, 1 Interstate 604. This point is not made in the appellant's brief and apparently was not raised below, but we have searched the books and found no case allowing a lien to a private carrier, while those cited deny it.

The judgment is affirmed. *Bland. P. J.*, and *Barclay, J.*, concur.

CHRISTIAN W. BIEST, Respondent, v. VERSTEEG SHOE COMPANY, Appellant. 97 137 / 99 1 29

St. Louis Court of Appeals, November 25, 1902.

1. **Agreement:** STATUTE OF FRAUDS. An agreement which can not be performed in one year from the date of making, is within the statute of frauds, although it may be completely performed in one year from the time when performance is to begin.

2. ——: ——. An agreement fixing a definite period for performance to continue to a date more than one year after the making of the agreement, is within the statute.

3. ——: ——: CONTRACT. The contract of a party to render service to another for more than a year from its date is within the statute, notwithstanding one or both parties may have the option of ending the contract by notice before a year elapses.

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4. ——: ——: MEMORANDUM. A written contract employing plaintiff "as a traveling salesman in the territory agreed upon [a list of these towns is hereto attached]" which was never completed by making out a list of the towns and attaching it to the contract, is not a sufficient memorandum to take the agreement out of the statute of frauds, because an essential term of the agreement, namely, the territory to be traveled by the plaintiff, was not noted in writing.

5. **Petition:** COUNT: PLEADING: VARIANCE. The second count of the petition *held* to sufficiently charge that defendant agreed to pay plaintiff the amount of his necessary traveling expenses, not to exceed a certain sum, instead of charging that he was to be paid said sum absolutely; and *held*, further, that there was no variance between the contract pleaded and the one proven in this regard.

6. **Proof:** JURY: PRACTICE, TRIAL: PRACTICE, APPELLATE. There was sufficient proof to go to the jury as to what plaintiff's necessary traveling expenses actually were.

7. **Instruction:** VERDICT: JURY: PRACTICE, TRIAL: DAMAGE. An instruction telling the jury if they found for the plaintiff on the second count of his petition their verdict should be in such sum as they found to be justly due him under the contract, was so modified by other instructions telling them how to estimate the damages to plaintiff, that the jury were not left to pass on the law of the matter, but were advised specifically as to what facts they must weigh in estimating the damages.

8. **Instructions:** BREACH OF CONTRACT. Instructions that if plaintiff gave some attention to his own affairs while in defendant's employ with defendant's consent, and that if he gave time to his own affairs but not so as to take up time which should have been devoted to defendant's business, such acts were not breaches of plaintiff's contract, *held* proper, especially in view of the counterparts of said instructions given at defendant's request that if plaintiff neglected defendant's business to attend to his own, this was a breach of his contract.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

REVERSED AND REMANDED.

Carr & Carr for appellant.

(1) The so-called contract of February 5, 1900, remained indefinite and incomplete by reason of the

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failure of the parties to subsequently agree on plaintiff's territory. (2) The contract being denied in the pleadings, the statute of frauds is available at the trial without special pleading. Royal Remedy Co. v. Grocer Co., 90 App. 53; Hillman v. Allen, 145 Mo. 643; Boyd v. Paul, 125 Mo. 9; Devore v. Devore, 138 Mo. 181; Hackett v. Watts, 138 Mo. 502. (3) A contract for one year, to commence at a future date, is within the statute of frauds. Sharp v. Rhiel, 55 Mo. 97; Briar v. Robertson, 19 Mo. App. 66; Cook v. Redman, 45 Mo. App. 397.

J. Hugo Grimm for respondent.

(1) The contract sued upon in the first count does not come within the statute of frauds at all, since it may be performed within one year, and, moreover, expressly provides that plaintiff should have the right to terminate it within the year. Boggs v. Laundry Co., 86 Mo. App. 622; Harrington v. Kansas City Cable Ry. Co., 60 Mo. App. 228; 1 Reed Statute of Frauds, secs. 192, 201. (2) Since the contract does not come within the statute, it is competent by parol evidence to show any provision or stipulation that was omitted from it, especially where it appears from the writing that something is omitted. Ringer v. Holtzclaw, 112 Mo. 522; Williams v. Railroad, 153 Mo. 534; Carney v. Light Co., 10 Mo. App. 536; Ellis v. Harrison, 104 Mo. 278; Scott v. Scott, 95 Mo. 318.

GOODE, J.—Biest, the plaintiff, was in the service of the VerSteeg Shoe Company and its predecessors, the VerSteeg-Grant Shoe Company and the Tri-State Shoe Company as a traveling salesman from the year 1892 to April, 1900, the territory he canvassed lying in the southeast and southwest portions of Missouri, the southern part of Illinois and certain towns in the States of Indiana and Kentucky.

A written contract was signed by Biest and the VerSteeg-Grant Shoe Company on the first day of Oc-

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tober, 1897, by which Biest was employed as salesman "in the territory agreed upon" for the term of two years from said date, to be binding for two more years unless he gave written notice to the contrary sixty days before the expiration of each year. Said contract was *mutatis mutandis,* like the one to be quoted below with the exception that the latter stipulated a list of towns to be visited by Biest should be attached to it.

Plaintiff continued to work under the first contract until the second day of October, 1899, when it was extended for the further period of six months, or until the first day of April, 1900. In view of the approaching expiration of that extension, Biest and the VerSteeg-Grant Shoe Company made another contract on the fifth day of February, 1900, which is as follows:

"This agreement is made for a term of one year commencing April 1, 1900, between the VerSteeg-Grant Shoe Company and C. W. Biest, and is to be binding for two more years unless written notice be given to the contrary by C. W. Biest sixty days before the expiration of each year. It is also agreed that if the said C. W. Biest wishes to discontinue this contract on October 1, 1900, he can do so by giving said VerSteeg-Grant Shoe Company notice of same on August 1, 1900.

"The VerSteeg-Grant Shoe Company agrees to employ C. W. Biest as traveling salesman in the territory agreed upon (a list of these towns is hereto attached) and further agrees to pay the said C. W. Biest the sum of four thousand dollars per year and necessary traveling expenses, not to exceed twenty-two hundred dollars per year, provided his sales exceed one hundred thousand dollars in the territory agreed upon. The said C. W. Biest agrees to faithfully devote his full time and energy to the sale of goods in the territory agreed upon.

"It is further agreed that the said C. W. Biest will keep Frank Hahn, or some one acceptable to the VerSteeg-Grant Shoe Company actively engaged as helper in said work, and if the party selected by said C. W. Biest should not be acceptable to the said VerSteeg-

Grant Shoe Company, the guarantee clause of this contract relating to traveling expenses shall be at the rate of fourteen hundred dollars instead of twenty-two hundred dollars per annum for such portion of the year or years still covered by this contract.

"It is further agreed that should the sales in said territory not reach the aggregate of one hundred thousand dollars the guarantee shall be three thousand dollars instead of four thousand dollars.

"The VerSteeg-Grant Shoe Company further agrees to allow the said C. W. Biest, when absolutely necessary, to cut the regular catalogue selling prices (not including jobs or rubber goods) to the extent of one-half per cent without deducting same from his compensation, any amount in excess of one-half per cent, or any shoes given away to customers or allowances made or extra discounts allowed to be deducted by customer, are to be charged to the said C. W. Biest or can be offset by the sale of certain goods bearing an additional profit and so designated in our catalogue. The one-half per cent to be allowed only in case the sales exceed one hundred and twelve thousand dollars against the highest amount of salary and expense guaranteed.

"Should the said C. W. Biest's sales fall below one hundred thousand dollars then this one-half per cent allowance is to be allowed him only if the amount of commissions that would be due him on a five per cent basis exceeds the compensation heretofore guaranteed to the said C. W. Biest; otherwise all cuts in prices, allowances, etc., to be charged to the said C. W. Biest.

"It is further agreed that the said VerSteeg-Grant Shoe Company, give said C. W. Biest credit for all duplicate orders filled by us from his customers during each season ending April 1, and October 1. Said VerSteeg-Grant Shoe Company, however, agrees to give the said C. W. Biest credit for such mail orders as may come from his customers for the two seasons following the season in which he actually sold such customer on the road and while in the employ of the VerSteeg-Grant Shoe Company, on condition that proper efforts shall

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have been made by said C. W. Biest, or his helper, in soliciting orders from said customer. This also applies to all customers sold by him two seasons ago. New accounts brought into the store by street men or our neighbors not to be included (only after having been sold by him first or next trip) only on such accounts (in the territory agreed upon) as are sold by said C. W. Biest on the road can credit be claimed.

"It is further agreed that no credit can be claimed by said C. W. Biest for orders not accepted, not shipped or not paid for, or where costs of collection be five per cent or over.

"If the said C. W. Biest's compensation, figured upon a five per cent basis, as per above contract, exceed the salary and expenses as guaranteed, the said VerSteeg-Grant Shoe Company agrees to pay him such excess.

"It is further agreed that the VerSteeg-Grant Shoe Company allow the said C. W. Biest one per cent additional commission on all goods sold to the Famous Shoe Company, being located in East St. Louis, Illinois, and that this one per cent additional commission will also apply to any store the said C. W. Biest may become financially interested in and which we may jointly agree to.

"It is further agreed that said VerSteeg-Grant Shoe Company pay the said C. W. Biest commission only on actual sales of rubber goods, and the said VerSteeg-Grant Shoe Company reserve the privilege of sending a special rubber salesman to said towns and on which sales said C. W. Biest can claim no commission.

"It is further agreed that the said VerSteeg-Grant Shoe Company will allow C. W. Biest access to the ledger twice a year in checking up his list of sales.

"Signed in duplicate this 5th day of February, 1900.

"VerSteeg-Grant Shoe Company,

"per W. B. VerSteeg, Secy."

A dispute having arisen between the parties in regard to the retention by the plaintiff of Frank Hahn,

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the helper provided in the foregoing contract, plaintiff sent in the checks for his sample trunks on the second day of April, 1900, accompanied by the following letter:

"Saint Louis, April 2, 1900.

"VerSteeg Shoe Co., City:

"Gentlemen: As my contract with your company has been broken by the action of your president, Mr. VerSteeg, in discharging me and refusing to recognize said contract, I herewith hand you my checks for said sample trunks, which you, no doubt, will want.

"Yours truly,
"C. W. BIEST."

In answer to that letter the defendant wrote plaintiff the next day as follows:

"April 3, 1900.

"C. W. Biest,
"Botanical Ave., City.

"Dear Sir: Your note of April 2 duly received. You are mistaken in saying that you are discharged by our president, Mr. VerSteeg. On the contrary he insisted that you should carry out all the terms of the understanding between us. If you desire to go out on the road, we will hold your place open for you for any reasonable time.

"Yours truly,
"VERSTEEG SHOE COMPANY."

Other correspondence and negotiations looking to a continuance of the relations of the parties followed, but they were unable to come to terms and the result of the disagreement was the present action, in which the plaintiff seeks in the first count of his petition to recover on the contract of February 5, 1900, what he would have earned if that contract had been performed, and on the second count a balance claimed to be due him for the salary and expenses of the last six months he worked under the contract of 1897, that is to say, from October, 1899, to April 1, 1900.

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He alleges that he stood ready to perform the contract of February, 1900, but was wrongfully prevented from doing so by the defendant and that he did fully perform the other so that there became due him thereunder the sum of $1,500 as guaranteed salary and the sum of $1,100 as guaranteed expense money, or in all the sum of $2,600; but that he had only been paid $1,213.17, leaving a balance due him of $1,362.83, for which he prays judgment in the second count, while the amount prayed for in the first count as what he would have earned if the contract therein declared on had been executed, is $5,000 for each year of the three years stipulated in the contract or $15,000 in all.

The answer to the first count contains a general denial and the special defense that the contract of February 5, 1900, was never completed, because, it was understood and agreed by the parties that before it became a complete contract, a list of towns which should constitute the territory of plaintiff as salesman was to be settled on by him and the defendant and attached to the written instrument; that no list of towns was ever agreed on or prepared so that the territory in which plaintiff was to travel, the settlement of which was an essential portion of that agreement, was never fixed.

The answer to the second count of the petition, in addition to a general denial, alleges it was a part of the contract of 1897 that plaintiff was to devote his full time and energy during its continuance to the sale of defendant's goods in the territory agreed on and when at home was to assist in selling goods in the house without additional compensation, and that although the defendant fully complied with the conditions of the contract, plaintiff refused to devote his full time and energy to selling goods in his territory, but spent most of the time during the extended period of the contract, attending to his own business, to-wit, managing the store he was interested in in East St. Louis.

It is further stated in the answer that if the plaintiff had faithfully devoted his full time and energy to the discharge of his duties during the period for which

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said contract was extended, he would have sold goods for the defendant to the amount of not less than $40,000, by his own personal efforts; but by reason of his gross neglect of duty, the sales made by him during that period amounted only to about $14,000, so that there was a falling off of $26,000, on which defendant's profits would have been $2,600, for which it prayed judgment by way of counterclaim.

The answer to the second count of the petition contains the following paragraph:

"Plaintiff further states that a certain list of towns was prepared and agreed upon between plaintiff and defendant as the territory of plaintiff under said contract and that said list of towns so agreed upon was made a part of said contract and that, prior to the expiration of said contract plaintiff and defendant by an agreement in writing, continued said contract in force and effect for a further period of six months, to-wit, for a term beginning the first day of October, 1899, and ending on the first day of April, 1900."

Plaintiff treated himself as discharged on the first day of April, 1900, because, as stated, he no longer desired to retain Hahn as his helper, Hahn being unprofitable to him, he said, and the contract giving him the right to engage some other helper acceptable to the defendant, which right the defendant refused to concede, claiming Biest asserted it in circumstances when it was unfair to do so and insisting on the retention of Hahn as the condition on which plaintiff could remain in its employ.

The following defenses to the first count of the petition were presented by the instructions requested:

First. That the contract of February 5, 1900, is void under the statute of frauds, because it is an agreement not to be performed within a year from its date and the memorandum of the agreement was incomplete in not stating the territory wherein plaintiff was to travel or having a list of towns attached, which essential

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element of the agreement could not be supplied by oral testimony.

Second. That the contract remained incomplete and incapable of supporting an action.

Third. That the defendant was justified in insisting on the retention of Hahn and that in doing so no breach of the contract was committed which warranted Biest to consider himself discharged or to quit defendant's service.

Fourth. That Biest entered into the arrangement in bad faith and without the intention of rendering faithful service.

The instructions given and refused bore on those defenses, but it is unnecessary to state them.

The special defense to the cause of action stated in the second count and the counterclaim set up by defendant are based on the alleged failure of the plaintiff to devote his time and energy to the prosecution of defendant's business as called for by the contract; and on this question we state that the evidence is highly contradictory as to whether he did in good faith attend to his business for the last six months he worked for the defendant, or neglected it to look after outside business. Defendant claims Biest stayed in St. Louis during the fall of 1899, long after he should have been on the road; that he spent most of his time attending to the Famous Shoe Store in East St. Louis instead of looking after his trade; that he remained in Paducah, Kentucky, a week, on an errand of his own connected with the sale of a shoe store there by a man named Adkins to a third party, and a sale by Biest to Adkins of Biest's interest in the East St. Louis store; that he sold goods for the Desnoyers Shoe Company and received commissions from it instead of acting exclusively for the defendant; that he jobbed goods from the East St. Louis store to a party in Illinois; that he was hostile to the defendant company and was arranging to go with the Giesecke Shoe Company, one of defendant's competitors in the city of St. Louis; also other conduct in disregard and breach of his duty.

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On the other hand, the testimony of Biest himself and of some witnesses is that he gave as much of his time to the defendant's business and as little to his own as usual; that he had long been in the habit of paying some attention to the East St. Louis store, with the knowledge and consent of the defendant; that he remained in St. Louis during the fall until after the fair was over, which was according to the practice of defendant's salesmen and the desire of the president of the company, who was endeavoring to get him to buy an interest in the company; that when he applied for expense money to go out on the road the treasurer of the defendant refused him by order of the president; that plaintiff went to Paducah to sell goods for the defendant and took orders while there, only casually attending to his own affairs; that the commission received from the Desnoyers Shoe Company was not for any sales made by him at all in behalf of that company, but grew out of some purchases made by Adkins after he became interested in the East St. Louis store for which the Desnoyers Shoe Company agreed to allow the Famous Shoe Company a commission, which the latter turned over to Biest because he took trouble for it without compensation, and, lastly, that while he sold a small batch of shoes amounting to about two hundred dollars to a dealer in Illinois for the Famous Shoe Company, this was a line of shoes wanted by the customer which the VerSteeg Shoe Company could not supply and therefore it was not injured when they were supplied by the East St. Louis house.

Errors assigned against the validity of the judgment on the second count are:

First. A variance between the petition and the proof in that the petition counted on a contract by which expense money to the extent of twenty-two hundred dollars a year was guaranteed by the defendant, whereas the proof showed it only guaranteed plaintiff's necessary expenses not to exceed that sum.

Second. Insufficient proof of what plaintiff's traveling expenses were.

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Third. That the verdict on the count was excessive.

Fourth. That the court submitted to the jury a question of law in an instruction which told them if they found for the plaintiff on the second count, the verdict must be in such sum as they might find was justly due him under the contract, if any.

Fifth. That the defendant himself admitted breaches of his contract in not going on the road earlier in the season, in accepting commissions from the Desnoyers Shoe Company and in making sales for the Famous Shoe Company.

On that count the court fully instructed the jury and the correctness of its charges will be discussed in the opinion.

A verdict was returned for the plaintiff for $1,325 on the first count of the petition, and $1,425 on the second count and against the defendant on its counterclaim.

The able counsel in this case prepared it for our examination with noteworthy closeness, perspicuity and force and we must express appreciation of their work; it has lightened our own and assisted us in reaching conclusions on important propositions which we hope are in accord with the best considered judgments of other courts.

I. The first point for decision is: Is the contract of February 5, 1900, within that provision of the statute of frauds, which says no action shall be brought to charge any person upon any agreement that is not to be performed within one year from the making thereof unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith or some other person by him thereto lawfully authorized? R. S. 1899, sec. 3415.

This clause of our statute of frauds is substantially, if not identically, the same as the one found in the statutes of most of the States and the English statute; but the decisions on it, like those on other clauses, are

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somewhat conflicting, and in the absence of a judgment on the very point at issue by an appellate court of this State, we must make up our minds as to what the law is from the weight of authority elsewhere.

Certain constructions given to the clause in question may be premised as showing the tenor of the decisions and as bearing on the particular contract before us:

An agreement which can not be performed within one year from its date, although performance may be completed in one year from the time it is begun, is within the statute. The year runs from the day when the agreement is made and not from the day when performance is to begin. Sharp v. Rhiel, 55 Mo. 97; Niller v. Goodrich Bros. Banking Co., 53 Mo. App. (K. C.) 436; Briar v. Robertson, 19 Mo. App. (K. C.) 66; Cook v. Redman, 45 Mo. App. (K. C.) 397; Bracegirdle v. Heald, 1 B. & A. 722; Snelling v. Lord Huntington, 1 C. M. & R. 20.

An agreement which may, perchance, be performed within a year from its date, consistently with its terms and not in violation of them, is not within the statute, although the performance is liable to occupy more than a year; such as a contract to support one for life, or during an indefinite period, or to work for another for life or for an indefinite period, or to do any other thing possible to be done within a year although the doing of it may continue, and may be expected to continue, longer. Foster v. McO'Blenis, 18 Mo. 88; Sugget's Admr. v. Cason's Admr., 26 Mo. 221; Boggs v. Laundry Co., 86 Mo. App. (St. L.) 616; Harrington v. Railway, 60 Mo. App. (K. C.) 225; Warner v. Texas & Pacific Ry., 164 U. S. 418; Roberts v. Rockbottom, 7 Met. 46; Green v. Harris, 9 R. I. 401; Hill v. Jamieson, 16 Ind. 125; Russell v. Slade, 12 Conn. 455; Peter v. Compton, 1 Smith's Leading Cases (9 Ed.), 586; Hutchinson v. Hutchinson, 46 Me. 154; Dresser v. Dresser, 35 Barb. 573; Heath v. Heath, 31 Wis. 223; Bule v. McCrea, 8 B. Mon. 422; Howard v. Burgen, 4 Dana 137; Murphy v. O'Sullivan, 11 West Jur. N. S. 111;

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McPherson v. Cox, 96 U. S. 404; Walker v. Johnson, supra; Southwell v. Beezley, 5 Oregon 43.

This rule has been extended in a few cases so as to exclude agreements from the statute if it is physically possible to execute them within a year (apparently without regard to what may have been in the minds of the parties concerning the time of their execution), but by nearly all authorities is applied only to agreements which show the parties contemplated the possibility of full performance being rendered in a year; not those of which the performance is barely possible but improbable. Boydell v. Drummond, 11 East. 155; Hurrin v. Butters, 20 Me. 122; Lockwood v. Barnes, 3 Hill (N. Y.) 128; Groves v. Cook, 88 Ind. 169; Farrell v. Tillson, 76 Me. 267; Hinckley v. Southgate, 11 Vt. 428; Sines v. Supt. of Poor, 58 Mich. 503.

If the time of performance depends on a contingency which may happen within a year and thereby result in a complete execution of the contract consistently with its terms, it is an agreement not within the statute although its performance would extend beyond the year if such contingency did not happen therein. This rule was established by the leading case on the subject against Lord Holt's dissent; Peter v. Compton, 1 Smith's Leading Cases (9 Ed.) 586; Roberts v. Rockbottom, Lockwood v. Barnes, Herrin v. Butters, supra, Saunders v. Kasterbrine, 6 B. Mon. (Ky.) 17; Randolph v. Turner, 17 Ohio 262.

It is well-nigh universally held that if an agreement fixes a definite period longer than a year during which performance shall continue, so that it was plainly not contemplated by the parties that it should terminate sooner, the statute applies; that is, where the contract not only allows but *requires* more than a year for its performance. Pitcher v. Wilson, 5 Mo. 46; Comes v. Lamson, 16 Conn. 246; Benier v. Cabet Mfg. Co., 71 Me. 506; Freeman v. Foss, 145 Mass. 361; McPherson v. Cox, supra.

And this rule is enforced generally though the agreement recognizes the possibility of some conting-

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ency happening to terminate performance before a year elapses, as will be seen from the authorities hereinafter cited.

Performance as used in the statute is construed to mean complete and full performance, according to the terms of the agreement. Boydell v. Drummond, supra; Giraud v. Richmond, 2 C. B. A. 35; Parks v. Francis, 50 Vt. 626; McElroy v. Ludlin, 32 N. J. Eq. 828; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Tiernan v. Granger, 65 Ill. 351.

The mischief meant to be guarded against by this clause is leaving the proof of any contract which is to run beyond a year dependent on the memory and truthfulness of witnesses; or, as is sometimes said, to be vouched by parol evidence. Boydell v. Drummond, supra; Smith v. Westall, 1 Ray. 316; Rucker v. Harrington, 52 Mo. App. (K. C.) 481.

The agreement between Biest and the defendant was to continue one year from the first day of April, and having been signed on the fifth day of February is within the statute unless it is taken out by some other term. The stipulation relied on for that purpose is the privilege given to Biest to discontinue the contract on the first day of October following its execution, by notifying the shoe company of his intention on the first day of August.

The question then is: Is the agreement taken out of the statute because it contains an option or privilege in favor of Biest permitting him to end it during the first year? And this question, in our opinion, must be answered by the weight of precedents directly in point rather than by reconciling either the judgments or reasons of all the cases bearing on it. A few decisions which exclude an agreement having a fixed time of performance but liable to be terminated by a contingency (such as the death of a party) from the operation of the statute, as an agreement to support a minor until his majority, or to abstain from doing an act indefinitely, would of course exclude this agreement if they were followed. But most cases are the other way, and hold

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a contract to render services for more than a year to be within the intention and force of the statute, notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance can not be rendered in a year consistently with the understanding of the parties. Dobson v. Collis, 1 Hurls. & Nor. 81; Ex Parte Acraman, 4 DeG. & F. J. 541; 7 L. T. R. 84; Booth v. Prittie, 6 Ontario Ap. 680; Packet Co. v. Sickles, 72 U. S. 580; Warner v. Railway, 164 U. S. 430; Meyer v. Roberts, 46 Ark. 80; Wilson v. Ray, 13 Ind. 1; Harris v. Porter, 2 Harr. (Del.) 27; Green v. Steel Co., 75 Md. 109; Deaton v. Tenn. Coal & Railway Co., 12 Tenn. 650; Blanding v. Sargent, 33 N. H. 239; Roberts v. Rockbottom, supra; Roberts v. Tucker, 3 E. 632; Sweet v. Lee, 3 M. & G. 452; Farrington v. Donahue, Qr. R. 1, C. L. 675; Murphy v. O'Sullivan, 11 Qr. Jur. N. S. 111; Souch v. Shawbridge, 2 C. B. 808; Ely v. Life Ins. Co., L. R. 1 Ex. D. 20; Becston v. College, 4 Bing.. 309; Ridley v. Ridley, 13 W. R. 736; Fenton v. Embless, 3 Burr. 1279; Brown on Statute of Frauds.

A number of those cases are on the very point involved, and we have found none to the contrary exactly in point, except Smith v. Conlin, 19 Hun (N. Y.) 234, and Blake v. Voigt, 134 N. Y. 69; the first of which is noticed and criticised as clearly erroneous in a note to Peter v. Compton, 1 Smith's Leading Cases (9 Ed.), loc. cit. 599; while the second adopts the first as a precedent. Peters v. Westborough, 19 Pick. 364, and Wiggins v. Keiger, 6 Ind. 252, are opposed to the principle of the cases relied on and to the point decided in many of them, since they hold agreements to support minors for a designated period and not merely for life, to be without the statute.

The English cases dealing with agreements depending on the continuance of life are to the effect that if an agreement may possibly be terminated by the death of a party within a year, yet if it is apparent that both parties contemplated it should extend longer than a year though no limit be designated, the statute takes

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effect and there must be a note to render a breach actionable. The American cases, on the other hand, maintain the rule that if the time for performance is not definitely fixed beyond a year, the possibility of death or some other event ending the performance within that time is sufficient to uphold a verbal agreement.

It is much easier to reconcile the rule, that an option to terminate a contract within a year will not take it out of the statute if it is made to run for a fixed period longer than a year, with the reasoning of the English than of the American cases; although the latter, as well as the former, for the most part, declare such agreements within the statute.

Several arguments are advanced in support of the doctrine; as that a contract is not performed within a year merely because it is put an end to in that period. But why should that argument not apply to the contingency of death as well as to the exercise of the privilege to terminate by one of the parties?

On the other side, it is argued that if there is a reservation in the contract of a right to end it by notice and this is done, the contract is as much performed within the contemplation of the parties as if it had run the whole time, and in a sense this is true.

It is also said, that, in order to exempt a contract from the operation of the statute on the score that it may be ended within a year by some event, the contingency must be one which tends to the performance of the contract as originally contemplated, instead of to its annulment or determination. And on this theory, perhaps, it is possible to reach the conclusion that there is an essential difference between a contingency like death, which lies beyond the control of the parties and so may have been contemplated by them as rounding out the expected performance if it happens, and a contingency dependent on their act, and which, therefore, annuls the contract and prevents performance.

All contracts not binding on personal representatives are ended by the death of a party, and probably all except marriage may be put an end to at any time

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by mutual consent; hence, by a rigorous application of these theories the statute of frauds would affect but few agreements and fall far short of accomplishing the purpose of its enactment. Those arguments, if sound in reasoning at large, are unsound in reasoning on the statute; for they take no account of its purpose; which, as said above, is to exact written proof of agreements to continue longer than a year, so as to avoid the uncertainty of oral testimony; and this logically requires all agreements calling for more than a year of performance to be included within the statute, notwithstanding they may be terminated sooner with or without the volition of the parties. If an agreement is to continue more than a year, with disputes concerning its terms liable to occur at any time, the policy of the law demands a memorandum in every instance to prevent disputes and afford means of settling them correctly when they arise.

But this statute is too ancient for a case to be brought within or put outside its effect by argument and is to be enforced according to its accepted interpretation; and after looking into all the cases to which our attention was directed, or which we found during our study of this one, we feel bound to hold the contract before us falls within the statute as usually construed, and must be proved by a sufficient memorandum for an action to lie on it.

The next inquiry is as to the sufficiency of the writing; and on this point we have no doubt that an essential item in the contract was omitted; in fact, the memorandum says on its face the Shoe Company agreed "to employ Biest *as a traveling salesman in the territory agreed upon* (a list of these towns is hereto attached)" but no list of towns was attached nor was one designated by the signed instrument so as to be connected with it without resorting to oral testimony; therefore there was an understanding as to territory which was never completed by settling precisely what territory Biest was to have, as the defendant claims; or, if settled as plain-

tiff claims, never signed or made part of the memorandum.

The fact that the writing itself shows there was a verbal agreement as to one term not included in the memorandum, answers the respondent's argument that the statute of frauds has no application to written contracts. The law is that all the essential terms of the agreement must be in writing so that parol evidence need not be resorted to to establish any of them. 2 Kent's Commentaries (14 Ed.) p. 511; Brown on Statute of Frauds (5 Ed.), sec. 371; Ringer v. Holtzclaw, 112 Mo. 519; Boyd v. Paul, 125 Mo. 9; Kelly v. Thuey, 143 Mo. 435; Smith v. Schell, 52 Mo. 218; Miller v. Goodrich, 53 Mo. App. (K. C.) 430; Claes L. Mfg. Co. v. McCord, 65 Mo. App. (St. L.) 507; Rucker v. Harrington, 52 Mo. App. (K. C.) 492. And when it is apparent a term agreed on was omitted from the memorandum, it can not be supplied by oral testimony. Cases, supra.

No more proof of the usefulness of stating in writing the territory to be canvassed by the plaintiff is needed than the testimony in the present case affords; for some of it goes to show there had previously been disputes about his territory and as to whether he or another salesman was entitled to credit for sales made in certain towns.

It is contended resort may be had to extrinsic evidence to show the conditions under which the agreement was made; the previous habits of the parties, what territory Biest had theretofore canvassed, and other matters in order to complete the contract. As to such evidence the law is in nowise different in respect to agreements required by the statute of frauds to be proved by a note and other agreements reduced to writing; either may be elucidated, explained and construed by the circumstances attending their execution. Brown on Statute of Frauds (5 Ed.), sec. 409. But if an agreement affected by the statute of frauds shows on its face it is incomplete in an essential part, it can not be completed by oral evidence; for, as has often been said, that would amount to construing the statute to require

a portion, but not all, of the elements of the agreement to be shown by a memorandum. Warren v. Mayer Mfg. Co., 161 Mo. 112; Wiel v. Willard, 55 Mo. App. (St. L.) 377. The law on this subject has been settled in this State in accordance with what it is elsewhere, since the decision of Ringer v. Holtzclaw, supra, overruled the cases of O'Neil v. Crim, 67 Mo. 250, and Lash v. Parlin, 78 Mo. 391, which supported actions based on incomplete memoranda. If the territory to be canvassed by Biest was an essential part of the contract, it certainly can not be shown by oral testimony what was agreed on as his territory, however positive and direct the testimony may be. Smith v. Shell, 82 Mo. 215; Boyd v. Paul, Ringer v. Holtzclaw, Wiel v. Willard, supra.

The memorandum on its face calls for a list of the towns to be attached and shows they were an agreed part of the arrangement; but if such a list is in existence (as to which the evidence is highly uncertain) it does not help the plaintiff, because it is nowhere shown to have been signed nor is it designated in the writing which is signed so as to identify it. Christensen v. Wooley, 41 Mo. App. (St. L.) 53. In fact, whatever list plaintiff and the defendant had seems to have been made some years previously and was not introduced by the plaintiff.

The testimony of the plaintiff on this question was not that the matter of territory was unimportant; for he swore it was extremely important because it required several years to build up a trade in a new territory; and the whole theory of his case on the first count is that he was driven by defendant's discharging him, into a new field where his sales were less than they would have been in his old one. But he affirmed he did not know the memorandum contained such a stipulation at the time he signed it and that it was agreed and understood between him and W. B. VerSteeg, the president of the company, that he should have his old territory. VerSteeg, on the other hand, swore the stipulation was put into the contract on account of previous disputes with Biest

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as to just what towns constituted his territory, for the purpose of preventing future disputes; also, that the territory traveled over by Biest and other salesmen was changed occasionally instead of continuing the same from year to year. The territory to be traveled under the contract of 1897 was agreed on, as both the answer and the proof show, thus demonstrating its materiality in the minds of the parties. Plaintiff said the territory was to be the same under the arrangement for 1900; but that was proving the territory orally and was inadmissible. There is evidence, too, that plaintiff was requested on different occasions to make out a list of the towns he wished to visit in order that the territory might be determined and the contract completed.

The result is, we must hold the cause of action stated in the first count of the petition to be within the statute of frauds and unproven by a memorandum sufficient to support an action.

2. The first point made against the judgment on the second count is that there was a variance between the petition and the proof in that the former declared on a contract by which the defendant guaranteed plaintiff a certain sum a year for traveling expenses, regardless of what his expenses actually were, while the proof showed a contract allowing him his necessary traveling expenses, not to exceed a certain sum per year.

That interpretation may be put on the petition if we attend only to the paragraph in which plaintiff alleges performance of the extended contract of 1897 whereby there became due him one-half year's salary (being the guaranteed salary) and one-half year's expenses; but that paragraph is in fact not the one wherein the plaintiff states the contract, which is done in a preceeding paragraph as follows:

"And plaintiff states that in and by said contract defendant agreed to pay him the sum of $4,000 per year and allow him traveling expenses *not to exceed* $2,200 *per year.*"

It thus appears plaintiff stated the contract exactly

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as defendant contends it was and as the proof showed. How then was the defendant prevented from moving for a more specific enumeration of items of expense if it desired particulars, especially as it had a copy of the contract, which was executed in duplicate?

Besides, when plaintiff was questioned as to his expenses, the objection made was not on the ground of variance, nor on the mode in which the petition stated the contract, but on the ground that the witness had already testified he kept no account of expenses and had no recollection of what they were.

This assignment, therefore, will be overruled.

It is contended that no sufficient proof was made as to what plaintiff's expenses actually were during the last six months, and it is true plaintiff testified he kept no personal expense account. There was evidence, however, as to what his expenses were; for it was shown that certain entries of money paid to him on defendant's books were marked as expense charges, and plaintiff testified the amounts shown on the books were actually used by him for expenses on the road.

On this question of expense the court instructed the jury to allow plaintiff the amount of his traveling expenses, not to exceed eleven hundred dollars, if they found the issues in his favor on the second count, which was correct; whereas, the instructions prayed by the defendant on that point were incorrect, for they propounded the theory that plaintiff was not entitled to receive credit for any expenditures unless he kept an itemized account or submitted vouchers. All that was necessary was for plaintiff to introduce substantial testimony by which the jury could estimate what his expenses were, and we think this was done.

Neither do we agree that the verdict on the second count was excessive, although defendant has gone into a minute calculation to show it was slightly so. We have examined it in comparison with the testimony and think the contention that the verdict was excessive is not made out clearly enough for us to condemn the action of the court below in refusing to set it aside.

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As to the point that the court erred in telling the jury if they found for the plaintiff, their verdict should be in such sum as they found to be justly due him under the contract; that direction, or line from an instruction, must be construed in connection with the other instructions; and when this is done it will appear the jury were not left to pass on the law of the case; for in the ninth instruction they were specifically told how to estimate the damages to be awarded and what facts to consider in making their estimate; that is, how to find out what sum was justly due the plaintiff; said instruction reading as follows:

"The jury are further instructed that if their finding be for the plaintiff on the second count of the petition, the verdict must be for the sum of fifteen hundred dollars for plaintiff's services, plus also the amount of his traveling expenses not exceeding the sum of eleven hundred dollars, from which you must deduct such sum as you may find plaintiff has heretofore received from defendant on account of said services and expenses; and on the balance, if any, you will allow interest at the rate of six per cent per annum from the seventeenth day of April, 1900."

As to whether plaintiff was guilty of a slight breach of his contract in staying off the road too much or in receiving a commission from the Desnoyers Shoe Company, or in selling a parcel of shoes for the Famous Shoe Company of East St. Louis, the evidence is conflicting, especially as to the first issue; but we do not regard said alleged breaches as of much importance. Those matters were trifling and are explained in the instructions of the court and the jury properly advised as to how they should determine whether or not they constituted substantial violations of his contract by the plaintiff.

The purport of the instructions was that if the plaintiff devoted such energy and attention to his duties as is usually given by industrious business men no breach occurred because he gave some attention to his own affairs, unless he thereby took up time which he

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should have devoted to the defendant's interest; also, that if what time he gave to the business in East St. Louis was with defendant's consent, it constituted no breach of the contract. The counterparts of those charges were given at defendant's request, telling the jury, in effect, that if plaintiff neglected defendant's business for his own, or ran the East St. Louis store without defendant's consent, he could not recover; but that defendant was entitled to recover on its counterclaim for such breaches whatever damages the jury might find it sustained thereby. It would have been manifest error, in view of the testimony, to have given some of the instructions requested by the defendant on those matters, since they were peremptory charges that the conduct of the plaintiff amounted to breaches. The evidence was far from warranting that conclusion, it being for the jury to pass on the question of whether a breach or breaches had been committed.

We think the case stated in the second count was fairly tried and that the finding thereon ought to be upheld.

The judgment is reversed and the cause remanded with directions to the court below to set aside the finding for the plaintiff on the first count of the petition, without disturbing the finding on the second count or on the counterclaim, and that judgment be entered as of the date of the original entry in favor of the plaintiff for the amount of the verdict on the second count, to-wit, the sum of $1,425; the costs in the trial court to be awarded at the discretion of that court. R. S. 1899, sec. 1550. The costs of this appeal are adjudged against the plaintiff. *Bland, P. J,* and *Barclay, J.,* concur.

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EDWARD BECKMANN, Appellant, v. EDWARD E. MEPHAM et al., Respondents.

St. Louis Court of Appeals, December 9, 1902.

1. **Contracts:** EXCHANGE OF LAND: STATUTE OF FRAUDS. A contract for the exchange of land for bank stock was alleged by plaintiff. In support of the allegation he offered certain written memoranda described in the opinion, and the court held them insufficient under the statute of frauds.

2. ———: ———: ———. A contract required by the statute of frauds to be in writing can not be enlarged by oral agreement so as to make the amendment enforcible when the statute is interposed.

3. ———: ———: ———. A contract for the exchange of land for land or other things than money is within the statute of frauds governing the sale of lands.

4. **Contracts:** STATUTE OF FRAUDS. If a part of an entire contract is within the statute of frauds, the whole is controlled by it.

5. ———: ———: PLEADING AND PRACTICE. The statute of frauds may be used as a defense under a general denial to a petition upon a contract, where the petition does not allege the contract to be oral, and the statute is invoked at the trial in some appropriate way.

Appeal from St. Louis City Circuit Court.—*Hon. Walter B. Douglas,* Judge.

Affirmed.

Alexander Young, Max. F. Ruler and *Upton M. Young* for appellant.

Thos. A. Russell and *H. Chouteau Dyer* for respondents.

BARCLAY, J.—This is an appeal from a judgment for defendant in an action to enforce a contract, stated

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in plaintiff's petition to be one of exchange and purchase, whereby plaintiff was to deliver to defendant ten shares of bank stock of the value of $6,500 for a lot of land in the city of St. Louis (valued at $2,500) and defendant was to pay to plaintiff the difference in value as part of the price of his stock.

The answer of defendants was a general denial. At the trial the defendants raised distinctly the issue that the contract sought to be proved was within the statute of frauds, and was therefore void. On that issue the court found in favor of the defendant who remained in the case after plaintiff had dismissed as to the other defendant during the progress of the trial.

At the close of plaintiff's evidence the court gave a peremptory instruction for the defendant, and thereafter entered judgment accordingly, from which judgment plaintiff appealed in the usual way.

The only point involved in the appeal is the sufficiency of plaintiff's testimony to establish a contract enforcible at law, for the action is one to recover damages as compensation for defendant's refusal to carry out the contract.

Plaintiff's evidence tends to prove that he inserted an advertisement in a daily newspaper in the city of St. Louis, by which he proposed to sell certain shares of bank stock. The advertisement was as follows:

"For sale—Fifteen shares or any part of Lafayette Bank stock. Address E. 30, Globe-Democrat."

The defendant's answer to the advertisement was as follows:

"December 5, 1900.

"Dear Sir: Please call or send price and your address regards Lafayette Bank stock you advertise for sale.

"Respectfully,

"E. E. Mepham.

"303 Benoist Building, 9th and Pine streets."

Some oral negotiations ensued, following which the defendant sent plaintiff the following communication:

"Dear Sir: After considering matters we are not willing to put our lot in at less than $50 per foot, as we feel we will be able to get that much for it next spring. If you feel justified in taking the lot at that figure, we can make a trade on basis of ten shares at $650 per share.

'Yours truly,
"E. E. Mepham,
"303 Benoist Bldg."

The foregoing written and printed memoranda constitute the entire evidence of any written agreement between the parties.

The contract which plaintiff claims defendant made, and which his petition counts upon, is one for the sale of plaintiff's ten shares of bank stock for $6,500 in consideration of the transfer to plaintiff of a lot (described in the petition) and the payment by defendant of the difference between said value of the stock and $2,500 the value of the lot, as proposed by defendant in the last memorandum above quoted.

The learned trial judge decided that the contract was within the statute of frauds and that it was not sufficient in form to support plaintiff's action.

I. It has been held in a very recent case in the Supreme Court that a contract required by the statute of frauds to be in writing can not be varied by oral agreement so as to make the oral agreement enforcible as part of the original contract. Warren v. Mfg. Co., 161 Mo. 112.

A contract for the exchange of land for land, or for other things than money, has been held to fall within the statute of frauds (R. S. 1899, sec. 3418), because within the reason and spirit of the language thereof as a sale of land. Purcell v. Miner, 4 Wall. 517; Browne, St. Frauds, sec. 271.

It is moreover undoubted law that "if part of an entire contract is within the statute [of frauds] the whole is governed by it." 2 Reed, St. Frauds, sec. 735.

In Andrews v. Broughton, 78 Mo. App. (K. C.)

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189, the court approves the following quotation from Browne on the Statute of Frauds, section 140:

"It is clear that if the several parts or items of an engagement are so interdependent that the parties can not reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one part or item can not be fairly and reasonably extracted from the transaction, no recovery can be had upon such part or item, however clear of the statute of frauds it may be, or whatever be the form of action employed. The engagement in such case is said to be entire."

It appears to us that the description of the land in question is wholly insufficient to satisfy the demands of the statute of frauds under the decisions in this State. King v. Wood, 7 Mo. 389; Fox v. Courtney, 111 Mo. 147; Ringer v. Holtzclaw, 112 Mo. 519; Whalen v. Hinchman, 22 Mo. App. (K. C.) 483; Weil v. Willard, 55 Mo. App. (St. L.) 376.

The land was an essential feature of the consideration to be given for the stock, and its identification with reasonable certainty was an inseparable and essential part of the written contract. The agreement is fatally deficient in that particular.

2. The answer was a general denial. The petition did not allege that the contract was oral. It merely alleged that the contract described was made. Thereby it implied that the contract was made in due and proper form. Van Idour v. Nelson, 60 Mo. App. (K. C.) 523. A general denial followed by an objection to the proof of an oral agreement or insufficient written agreement because of the statute of frauds was a proper way to interpose the defense of that statute. Allen v. Richard, 83 Mo. 55; Boyd v. Paul, 125 Mo. 9. The trial court sustained defendant's contention on that ground. We think that ruling was right.

The judgment is affirmed. *Bland P. J.*, and *Goode, J.*, concur.

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ALFRED A. PAXSON, Respondent, v. MALCOLM W. MACDONALD, Adm'r, et al., Appellants. 97 f100 165 *184

St. Louis Court of Appeals, December 9, 1902.

1. **Depositions:** STATUTORY CONSTRUCTION: COSTS. Where a party has given notice to take depositions, and a commissioner is appointed under the Missouri statute on the subject, the party at whose instance the depositions are taken is chargeable with the fees allowed by the court to the commissioner; and where the same have been taxed in his favor as costs against the adverse party, but are uncollectible, the party at whose instance the depositions were taken may be held liable for said fees.

2. **Commissioner to Take Depositions:** A commissioner to take depositions, appointed as stated in the case at bar, may be allowed by the court reasonable compensation, although no express statutory provision so declares.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

AFFIRMED.

Hickman P. Rodgers for appellants.

(1) The special commissioner did not perform his services at the instance and request of MacDonald; but as an officer of the court on motion of Watkins. R. S. 1899, sec. 2883. (2) The subject of costs is a matter of statutory enactment; and all such statutes must be strictly construed. Ring v. Vogel Paint & Glass Co., 46 Mo. App. 375; Wilson v. Ruthrauff, 87 Mo. App. 226; State v. Oliver, 126 Mo. 188. (3) Costs can not be taxed against the prevailing party except such as have been adjudged against him. Thompson v. Elevator Co., 77 Mo. 520. (4) Fees of officers of the circuit court for their services in a cause determined therein, can not be recovered by suit in a collateral proceeding. The remedy provided for the collection of their

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fees, is a fee bill in the case in which the fees were earned. Hoover v. Railroad, 115 Mo. 77. (5) Plaintiff's petition fails to state facts sufficient to constitute a cause of action. Watkins v. MacDonald, 70 Mo. App. 357.

Alfred A. Paxson, pro se.

(1) Appellant nowhere raises the question of want of parties in the case. He makes two objections, viz.: (a) That the circuit court had no jurisdiction of the subject-matter. (b) The petition does not state facts sufficient to constitute a cause of action. So that under the repeated decisions of this and the Supreme Court, no point, even were it tenable, can be made here on the ground of want of proper and necessary parties. (2) "By filing an answer and going to trial defendants waived any objection as to defect of parties." Stewart v. Gibson, 71 Mo. App. 232; Planing Mill v. Pres. Church, 54 Mo. 520. Our statute on executions provides that: "No execution shall issue upon any judgment or decree rendered against the testator or intestate in his lifetime, or against his executors or administrators after his death, which judgment or decree constitutes a demand against the estate of any testator or intestate, within the meaning of the statute respecting executors and administrators; but all such demands shall be classed and proceeded on in the court having probate jurisdiction, as required by statute." R. S. 1899, sec. 3177; Griswold v. Johnson, 22 Mo. App. 466; Hardin v. McCause, 53 Mo. 225; Wernecke v. Kenyon, 66 Mo. 275; Wernecke v. Wood, Admr., 58 Mo. 352; Brown v. Woody, Admr., 64 Mo. 547. All to the effect that the defendant in the judgment being dead, no execution can issue. (3) A fee bill is in the nature of and is an execution, under which a levy can be made. The judgment in this case being for costs incurred by the defendant himself, after the return of nulla bona on the fee bill, became in effect a judgment against defendant in the case of Watkins v. MacDonald.

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PER CURIAM.—This is an appeal from an order of the circuit court granting a new trial.

We adopt the greater part of the statement of facts submitted in this court on behalf of appellants, abbreviating it somewhat and omitting an instruction for plaintiff which the court refused.

This proceeding was instituted in the probate court in the usual form of a claim and demand for allowance against the estate of Robert S. MacDonald, deceased, and is based on services rendered by Alfred A. Paxson, as special commissioner, in the taking of depositions in the case of Watkins v. MacDonald, in the circuit court, and an allowance in the sum of $110 made by that court to said commissioner for his services.

The probate court allowed the claim against the estate and the administrator appealed to the circuit court.

The facts as shown by the evidence are briefly these:

In 1895 there was pending in the circuit court of the city of St. Louis, a suit for damages entitled Louise Watkins v. Robert S. MacDonald, in which defendant gave notice to take depositions, whereupon plaintiff went into court and asked that a special commissioner be appointed to take depositions and the court thereupon appointed Alfred A. Paxson, plaintiff herein, as commissioner. The depositions were taken before said commissioner, who duly certified the same to the court wherein said Watkins case was pending and asked that an allowance be made him for his services. Thereupon the court allowed the said commissioner $500 for his services and allowed $357.60 to his stenographer and ordered execution for the aggregate amount of said sums against defendant.

From this order MacDonald appealed to the St. Louis Court of Appeals and this court reversed the order of allowance and remanded the cause to be disposed of in conformity with its opinion, which held that the trial court "should have assessed a proper amount for the services of the commissioner and his stenographer to be taxed as a part of the general costs

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at the end of the litigation." In conformity with this mandate the following order was made by the circuit court in said cause, viz.:

"It is ordered by the court that the motion of the special commissioner herein filed on November 20, 1896, for an allowance be, and the same is hereby sustained, and that he be and hereby is allowed the sum of $110 as compensation for his services rendered herein, said amount to be taxed as costs."

Afterwards, the case of Watkins v. MacDonald was dismissed for want of prosecution and a fee bill was duly issued against the plaintiff in that case for the total amount of costs, one item being the amount of $110 allowed to said special commissioner. This fee bill was returned unsatisfied. Nothing further was done in the matter by the special commissioner until after the death of MacDonald, several years later.

The special commissioner was repeatedly asked by MacDonald, while said Watkins case was pending, to move for security for costs therein, but he failed to do so.

The trial of this case in the circuit court, without a jury, resulted in a judgment for defendants. In due time plaintiff filed a motion for a new trial which the court sustained on the first ground thereof, viz., "that the finding and judgment were against the law and evidence."

Subsequently and in due time defendants perfected their appeal to this court from the order sustaining the motion for a new trial.

Defendant's instructions as given by the court were as follows:

"1. The court declares that under the law and the evidence, claimant is not entitled to any allowance in his favor.

"2. The court declares as a matter of law, that all the issues in this case have been adjudicated against the claimant by a decision of the St. Louis Court of Appeals rendered in the case of Watkins v. MacDonald and reported in the Missouri Appeal Reports in volume 70

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at page 357; and the order of the circuit court made in pursuance thereof."

The material facts of the former litigation bearing upon the present action are sufficiently shown by the report of the case of Watkins v. MacDonald, 70 Mo. App. (St. L.) 357.

The opinion delivered by the learned trial judge granting the new trial sufficiently states the grounds of his ruling. We approve the same and adopt it as our own, as follows:

"Paxson v. MacDonald, No. 21799.

"Memo. of the court.

"On a re-examination of this case, I am led to the conclusion that I was in error in rendering judgment for the defendant.

"The facts in the case are as stated in the prior memorandum, that the plaintiff, Paxson, was appointed special commissioner to take depositions in the case of Watkins v. MacDonald, pending before the circuit court in this city in 1895, and that said depositions were taken on behalf of the defendant, and an allowance therefor was made him on the twentieth of May, 1897, and ordered to be taxed as costs in the case; that thereafter a fee bill was issued for costs in the case, but was returned nulla bona, the case itself having been dismissed for want of prosecution.

"The services which the plaintiff is here seeking to recover are not specially covered by any statute, and yet, having been rendered for the defendant, it may be admitted that the defendant is primarily liable therefor.

"It was said in the case of Adam v. Railroad (18 Mo. App. 376), that 'A person entitled to costs for services rendered at the request of the defendant could, in the manner provided in such section, have compelled defendant to pay such costs. After judgment, even had the judgment been in favor of the defendant, the defendant could have been thus made to pay costs made at its request.'

"In the case of Hoover v. Railroad (115 Mo. loc.

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cit. 87) it is said that 'For any services rendered the defendant in the case the right still remains to have a fee bill issued from the circuit clerk's office.'

"These cases seem to establish the fundamental proposition that that party to the litigation who incurs costs is primarily responsible to those by whom the services were rendered for the payment therefor; and that even though the judgment be in favor of the defendant and the costs taxed against the plaintiff, nevertheless if the plaintiff is unable to pay them, those to whom the costs are due may still recover them as against the defendant if at his instance the services were rendered.

"In the case of officers of court and witnesses, for the payment of whose services provision is made by statute, the proper proceeding would have been the issuance of a fee bill against the party to the litigation at whose request the services were rendered; and in the case which we are now considering, had there been anything due to the officers of the court or to witnesses, for the payment of whose services provision is made by statute, undoubtedly a fee bill could have been issued against the defendant even though judgment was in his favor; and under the authority of the case of Hoover v. Railroad (18 Mo. App. loc. cit. 83) it is decided that the only method by which officers of the court and witnesses for the payment of whose services provision is made by statute, can recover for their services is by fee bill, and they can not recover by a judgment.

"In the case before us the plaintiff is seeking to recover by an independent suit. If he were an officer of the court, for the payment of whose services provision is made by the statute, he could not recover in such a proceeding as he has instituted, but would be required to depend on the fee bill for a recovery of his services; in establishing such a fee bill, he would be required to place his finger on the section of the statute which authorized every item of the bill.

"The plaintiff, however, is not, under the law, entitled to a fee bill, for he can point to no statute which

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authorizes the payment of his services; and yet he is entitled to payment for his services, as was expressly decided for this plaintiff and concerning this claim in the case of Watkins v. MacDonald (70 Mo. App. 263). He can not be deprived of compensation for such services as were rendered at the request of the defendant, simply because the plaintiff is insolvent; and while he is unable to have a fee bill issued to enforce the collection of his claim because there is no statute to warrant it, he is nevertheless entitled to a judgment against the defendant or the defendant's representatives, under the principle above declared that each party to the litigation is primarily responsible for the services rendered at his request.

"It is contended by the defendant that the matter has been decided in the case of Watkins v. MacDonald, supra, and if such contention is true it would of course definitely determine the case before me.

"In my judgment, however, the decision of the Court of Appeals in the case of Watkins v. MacDonald sustains the opposite of such contention; for that case not only distinctly provides that a commissioner 'is entitled to a reasonable compensation' but requires that such compensation should be taxed as a general cost at the end of the litigation. This does not in any sense change the rule established by the Court of Appeals in the case of Adams v. Railroad, supra, that a defendant, even after judgment in his favor, is liable for the costs incurred at his request, though taxed as general costs against the plaintiff.

"It is further decided that the circuit court was wrong, not in ordering an execution against the defendant, but in the time at which such execution was ordered, in that before a final judgment in the case an execution was ordered against the defendant.

"Under this view of the case, the motion for a new trial must be sustained."

The foregoing lucid discussion of the vital points of the controversy leaves little to be added. We are of opinion that a commissioner appointed by the court to

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take depositions under the statute on the subject (R. S. 1899, sec. 2883) stands in the place of a notary or other officer authorized by law to take such evidence, so far as concerns his right to look to the party at whose instance the testimony is taken for compensation allowed by the court for his services. The authority of the court to allow such a commissioner compensation for his services has been repeatedly recognized in appellate decisions, both by express rulings and by necessary implication from principles declared therein. Garrett v. Cramer, 14 Mo. App. (St. L.) 401; In re St. L. Inst. Ch. Sc., 27 Mo. App. (St. L.) 633; State ex rel. v. Ashbrook, 40 Mo. App. (St. L.) 64; Watkins v. MacDonald, 70 Mo. App. (St. L.) 363.

The fundamental ideas upon which the trial court's ruling rests are that "the laborer is worthy of his hire," and that an officer who performs such services has the right to look to the person at whose instance they were performed for his compensation, at least (though we do not say necessarily, for that point is not before us) after other resources for his payment have been exhausted, as in the case at bar wherein a fee bill against plaintiff in the original suit (against whom costs were adjudged as between her and the defendant) was ascertained to be ineffectual before the beginning of this action.

The order granting a new trial is affirmed, all the judges concurring.

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SIEMANS & HALSKE ELECTRIC COMPANY OF AMERICA, Respondent, v. GERRIT H. TEN BROEK, Appellant.

St. Louis Court of Appeals, December 9, 1902.

1. **Promissory Note**: CONSIDERATION: LIABILITY OF PARTIES. The surrender of a note is a good consideration for the making of another.

2. ———: ———: ———: INDORSER: MAKER OF NOTE. When a note is surrendered and a new one given, the new note is a new contract and not a continuation of the old one; and the question of the liability of a party thereto as maker or indorser must be ascertained from the position his name occupies on the new note, without regard to the nature of his liability on the old one.

3. ———: ———: ———: ———: EVIDENCE: PRESUMPTION. When there is no evidence that it was understood when a party signed a note that he signed it as an indorser, or that he should be treated as an indorser, the presumption of law is that he signed it as a maker.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

H. M. Wilcox for appellant.

A renewal note is a renewal of the contract under which the original note was given. It is subject to the same defenses and is protected by the same rules, as the original. Coming v. Leedy, 114 Mo. 454; Hunt v. Rumsey, 83 Mich. 136; Bank v. Plankington, 27 Wis. 177; Bank v. Orchard, 39 Neb. 485; Schutt v. Evans, 109 Pa. 625.

Lee W. Grant for respondent.

Whatever may be the law in other States, the law has been well settled in this State for sixty years that where a person other than the payee puts his name on

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the back of a note, his liability is prima facie, that of a co-maker. It is equally well settled that if he desires to prove that it was the agreement between the parties that his liability should be that of an endorser only, the burden of proving such an agreement is on him. Lewis v. Harvey, 18 Mo. 74; Cahn v. Dutton, 60 Mo. 297.

BLAND, P. J.—In the spring of 1899, the Holland Building Company, a corporation, was insolvent and in the hands of a receiver. The appellant was its president. In settlement of a part of plaintiff's claims the Holland Building Company, by its president, executed to plaintiff four promissory notes of $100 each. Each of the notes were, before delivery, indorsed on the back by appellant and L. C. Spooner. Two of the notes were paid by the Holland Building Company. The other two notes were protested for non-payment, and notice thereof duly given to the appellant and Mr. Spooner. Subsequently one of these notes was paid by appellant and the other was surrendered up and a new note given for the same amount, signed and indorsed as was the original. This note was not paid at maturity nor was it protested for non-payment, nor was notice of its non-payment given to appellant.

The suit, which is on this note, was commenced before a justice of the peace, where judgment was rendered by default against the Holland Building Company and appellant. Mr. Spooner was not made a party to the suit. An appeal was taken by Ten Broek to the circuit court, where, on a trial anew, judgment was again rendered for the plaintiff, from which Ten Broek appealed.

The contention of appellant is that he indorsed the original notes on the back thereof as an indorser and not as a maker and that it was so agreed and understood by him and plaintiff's agent who took the original notes. Ten Broek's evidence tends to prove that such was the understanding. His evidence and the fact that he was treated as an indorser and not as a maker by the plaintiff (evidenced by the fact that plaintiff had the original

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note protested for non-payment and notice given thereof to Ten Broek), we think, tends to overthrow the presumption that he indorsed the original notes as a maker.

The trial court by its declarations of law held, in substance, that it was immaterial in what capacity appellant indorsed the original note; that his liability became absolutely fixed when the note was protested for non-payment and that in the absence of an agreement that he was to be held as an indorser only on the renewed notes, the law presumed him to be a maker. The correctness of this ruling is the only material question to be considered.

The surrender of one note is a good consideration for the making of another one. 1 Randolph on Commercial Paper, sec. 459. Appellant's liability on the surrendered note, whether he be regarded as maker or indorser, was fixed and absolute. The surrender of the original note was, as to him, a good consideration for his making the new one.

As a general proposition the renewal of a note is not payment. 3 Randolph on Commercial Paper, sec. 1511; 2 Daniels on Negotiable Instruments, p. 289; Appleton v. Kennon, 19 Mo. 637; Leabo v. Goode, 67 Mo. 126; Montgomery County v. Auchley, 103 Mo. l. c. 506; Reyborn v. Mitchell, 106 Mo. 365; Commiskey v. McPike, 20 Mo. App. (St. L.) 82; State ex rel. Crider v. Wagers, 47 Mo. App. (K. C.) 431. But where the old note is cancelled and surrendered to the maker on delivery of the new one, it seems to us this would be strong presumptive evidence that the agreement of the parties was that the old note should be extinguished by the new. However, we do not think it important in this case whether the agreement between the parties was that the old note should be extinguished by the new, or that it should continue in force with the right to sue on it suspended until after the maturity of the new note. The new note was a new contract, not a continuation of the old one, and is free from any conditions expressed in the old (Rogers v. Broadnax, 27 Tex. 238; 1 Randolph

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on Commercial Paper, sec. 94) and must be interpreted by its own terms and the liability of the defendant as maker or indorser be ascertained from the position his name occupies on the note. To resort to the old note alone to ascertain these facts would be to deny the parties the right to make a new contract and to engraft upon the new note a condition in the old which does not appear on the face of the new, and which the defendant did not offer to establish by any oral evidence. The onus was on him to prove that he did not sign the note as a maker and he failed to show it.

If any inference is to be drawn from the previous dealings between the parties in respect to the capacity in which the defendant signed the new note, we think the inference should be made that he took upon himself the same obligation that he was under when he signed the new note, i. e., a fixed and unconditional obligation to pay the debt. But we do not think a resort should be had to the old note for the purpose of explaining or qualifying the fact that prima facie the defendant is a maker of the new note.

The only bearing the old note has on the new is in support of its consideration and validity, and to this extent only can the new note be affected by the old. There is no fraud or want of consideration pleaded and, hence, the new note is in nowise affected by the old. It is a new contract between the same parties, supported by a good consideration, and their relations to it must, under the pleadings, be solved independently of the old note. There is no evidence that it was understood when appellant signed the new note he signed it as an indorser or that he should be treated as an indorser. The presumption of law is that he signed it as a maker. Lewis v. Harvey, 18 Mo. 74; Cahn v. Dutton, 60 Mo. 297.

There being no evidence to overthrow this presumption, the learned circuit judge correctly held him liable as a maker and the judgment is affirmed. *Barclay* and *Goode, J. J.*, concur; the former concurs in the result.

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BEVERLY A. DYER, Appellant, v. ST. LOUIS TRUST COMPANY, Respondent.

St. Louis Court of Appeals, December 9, 1902.

1. **Certificate of Title:** DEFECTS: LIABILITY OF TITLE COMPANY: LIS PENDENS: INSTRUCTIONS: ERROR: PRACTICE, TRIAL. On an application to plaintiff to make a mortgage loan he applied to defendant for a certificate of title, which defendant furnished. It omitted a notice of *lis pendens* in an action in which the borrower's title was afterwards defeated. Plaintiff made the loan, and alleged that he loaned $160, and that all but $35 was paid when the trust deed was foreclosed. The answer denied that any money was loaned. At the trial plaintiff produced the borrower's notes amounting to $160 and testified that he loaned her the full amount. Her husband testified that he negotiated the loan and that only $125 was actually loaned. The court declared the law to be that if, before advertisement was begun of the sale under the deed of trust, all the money loaned had been repaid, the verdict must be in favor of defendant. *Held*, that, though the instruction was faulty in omitting plaintiff's right to interest, as he had alleged in his petition that all but $35 had been paid, and, if so, he had received more than $125 and interest, he was not prejudiced by such error.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

AFFIRMED.

Carter & Sager for appellant.

(1) The damage complained of and sought to be recovered is not what appellant lost by reason of the borrower's failure to pay all the notes, but what he lost by the purchase at the sale under the deed of trust, when he bid in the lands for $230.12, to which was added costs, taxes, etc., aggregating an approximate of the amount prayed for in the petition. (2) The first declaration of law covered the only question in the case,

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to-wit, appellant's knowledge and good faith. There is nothing to show what the court's finding of fact was, and it must be presumed that the finding was in favor of appellant on the question of knowledge and good faith, otherwise the second declaration would not have been given. (3) The giving of an erroneous instruction is ground for reversal, unless there is a finding of facts showing that the court's ruling was not predicated upon such instruction and the facts applicable thereto. State ex rel. v. Finn, 11 Mo. App. 546.

Stewart, Cunningham & Eliot for respondent.

(1) Appellant contends that instruction 2 is erroneous, in that it debars him from recovering in this action what he would have made by purchase at a trustee's sale, which he procured to be made to pay a note which was without consideration, and all of which, if it represented anything, represented usurious, unlawful interest over and above eight per cent on the $125 he had loaned Annie Lee Fling, which $125 and maximum lawful interest had all been repaid plaintiff before he caused the land to be advertised for sale. In support of this contention appellant says in his brief: "The damage complained of and sought to be recovered is not what appellant lost by reason of the borrower's failure to pay all the notes, but what he lost by the purchase at the sale under the deed of trust when he bid in the lands for $230.12, to which was added costs, taxes," etc. (2) This contention of appellant can not be maintained, for if plaintiff had been deceived or misled by defendant's certificate to plaintiff's damage, the measure of that damage would have been simply what plaintiff actually lost of his original outlay of loan, and not what he might or would have profited by a long-subsequent purchase of or speculation in the collateral security he took for his loan. Roberts v. Sterling, 4 Mo. App. 593; Clark v. Marshall, 34 Mo. 429.

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BLAND, P. J.—Carrie Lee Fling (formerly Carrie Lee Long) made application to plaintiff for a loan of $160, and to secure the same tendered a deed of trust on property described in the certificate of title set out below. Plaintiff then applied to defendant for a certificate showing the condition of the title to the lots. After making an examination of the deed records in the recorder's office in the city of St. Louis, defendant made out and delivered to plaintiff the following certificate:

"No. 6403.

St. Louis, Mo., July 19, 1895, 8 a. m.

"B. A. Dyer, Esq.

"Sir: The St. Louis Trust Company hereby certifies that according to the records contained in the several offices wherein conveyances of, or incumbrances on, or liens against real estate situated in the city of St. Louis, Missouri, may be filed or recorded, the title to the lots ten and eleven in the subdivision of the N. E. 1-4 of Block No. 93 of the De Ward Survey of the City Commons, and in City Block No. 2750 of the said city of St. Louis.

"Said lots having an aggregate front of 56 feet 3 3-4 inches on the western line of Broadway by a depth westwardly to the eastern line of Oregon avenue, on which they front 53 feet, as shown on the foregoing plat, is fully vested in fee simple in Carrie Lee Long, subject to the hereinafter mentioned defects, and is unincumbered except as follows:

"General Taxes of 1894—Delinquent $14.87 and interest.

"General Taxes of 1895—Not yet payable.

"General Taxes of 1896—Not levied, but a lien.

"Special Taxes, none found on record of the city comptroller's office, except the following:

"Street Sprinkling 1894—Delinquent, $1.58 and interest.

"Street Sprinkling 1895—Not yet payable.

"Assessments for street and alley openings. None found of record in the city comptroller's office.

"Deed of trust recorded in book 976, page 16, and

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book 966, page 273, were released by deed of release recorded in book 1000, page 232.

"Judgments—None.

"Attachments—None.

"Mechanic's Liens—None.

"The certificate of acknowledgment to the deed from Nancy Wait and husband to Carrie Lee Long, recorded in book 1171, page 473, is defective.

"By deed recorded in book 1227, page 554, the sheriff of the city of St. Louis conveys to Conrad Fink et al. 'all the right, title and interest of James Edwin Long' in the above described property.

"In witness whereof, The St. Louis Trust Company has caused this certificate to be signed by its president; attested by its secretary, and its corporate seal to be hereunto affixed, the day and year first above written. Void unless attached to our examination. No. 6403, Lots 10 and 11, City Block No. 2750.

"St. Louis Trust Company,
"By Thos. H. West, President."

For which service plaintiff paid defendant $10.

Plaintiff then took from Mrs. Fling her six promissory notes as follows: One note for $25 due in thirty days; one note for $25 due in sixty days; one note for $25 due in ninety days; one note for $25 due in one hundred and twenty days; one note for $25 due in one hundred and fifty days; one note for $35 due in one hundred and eighty days; all bearing interest at the rate of eight per cent per annum from maturity, and testified that he loaned her the $160. He had the deed of trust recorded and afterwards re-recorded on account of a change of trustee in the deed. He testified that all the notes were paid except the last one for $35; that on account of the non-payment of this one he caused the land to be advertised under the deed of trust and sold by the trustee. At the sale he became the purchaser for $230.12, which sum he disbursed by paying the costs of the foreclosure sale, taxes, the balance due on his debt, and $25.89 to Mrs. Fling.

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It is admitted by the pleadings that at the time plaintiff made the loan there was pending in the St. Louis Circuit Court a suit in equity brought by William C. Fink et al., against Carrie Lee Long and James E. Long, her husband, the object of which was to divest the title in and to the lots out of Carrie Lee Long and to invest plaintiffs therewith; and that a statutory notice of the pendency of the suit, of its purpose and nature, was duly filed and recorded in the office of the recorder; that before the termination of the suit Carrie Lee Long was divorced from her husband and then married her present husband, Willis W. Fling, who was made a party to the suit; that the suit resulted in a decree divesting Carrie Lee Fling and her husband, Willis W. Fling, of all title in said lots and investing the plaintiffs with the title thereto.

It is alleged in the answer, but denied by the reply, that plaintiff Dyer had actual knowledge of the pendency and nature and object of the suit when he made the loan to Mrs. Fling. It is admitted by the pleadings that after plaintiff received the trustee's deed to the lots, a suit was brought by William Fink et al. (same plaintiffs as in suit against Fling and wife) against plaintiff Dyer, the trustee in his deed of trust, and the St. Louis Trust Company, in the St. Louis Circuit Court, to set aside the deed of trust and the trustee's deed thereunder to Dyer, which resulted in a decree in favor of the plaintiffs.

2. It is denied by the answer that plaintiff loaned any money to Carrie Lee Fling.

The issues were submitted to the court without a jury. But two facts were in dispute, first, as to the actual amount of money loaned by plaintiff to Mrs. Fling and, second, whether or not plaintiff had actual knowledge of the pendency of the suit in equity, by William Fink et al. and Carrie Lee Long and her husband, involving the title to the lots, when he made the loan and took the deed of trust.

Plaintiff introduced the notes of Mrs. Fling and testified that he loaned the entire sum of $160 to her.

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Willis Fling testified that he negotiated the loan; that all the money loaned by plaintiff was paid to him and that the sum of $125 only was actually loaned.

Plaintiff also testified that he had no knowledge whatever of the pendency of the suit of William Fink et al. against Carrie Lee Fling and her husband when he made the loan, and that he relied entirely on the certificate of title furnished him by the defendant.

Willis Fling also testified that pending negotiations for the loan the litigation concerning the title to the land was discussed by plaintiff and his attorney, the late John Kerr, in his (Fling's) presence.

At defendant's request the court declared the law as follows:

"1. If the court sitting as a jury believe from the evidence that the plaintiff, at or before the time he loaned money to Carrie Lee Fling, had actual notice or knowledge of the pendency of the suit of Fink and others against Carrie Lee Long and others, and of the filing in the recorder's office of the notice of that suit here offered in evidence, then your verdict should be in favor of the defendant.

"2. If the court sitting as jury believe from the evidence that before advertisement was begun of the sale under the deed of trust of Carrie Lee Fling and Willis W. Fling, dated August 24, 1895, all the money actually loaned by the plaintiff to said Carrie Lee Fling had been actually repaid to the plaintiff, then your verdict must be in favor of the defendant."

Plaintiff did not ask for instructions and concedes that No. 1, given for defendant, is correct but contends that No. 2 is erroneous because, conceding that plaintiff loaned Mrs. Fling but $125, the instruction authorized a finding for defendant if plaintiff received back this exact amount and no more, and thus denied him the right to the agreed interest of eight per cent per annum. The instruction is faulty in omitting the item of interest, but we do not see how plaintiff was prejudiced thereby for he alleged in his petition that all the notes, except the last one for $35, was paid to him by Mrs. Fling; if

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so then he had been paid more than $125 and all interest that had accrued thereon at the agreed rate per cent before the foreclosure sale, and the note for $35 remaining unpaid would not represent any damage he had sustained.

The judgment is affirmed. *Barclay* and *Goode, JJ.*, concur.

MINA TORLOTTING, Appellant, v. MICHAEL TORLOTTING, Respondent.

St. Louis Court of Appeals, December 9, 1902.

1. **Divorce:** CRUEL TREATMENT: EVIDENCE: CROSS-BILL. In an action for divorce, tried on evidence raised by defendant's cross-bill charging cruel treatment in shooting at him several times, one ball passing through his body, in which his wife claimed that she did not know him at the time of shooting, though it was broad daylight, and they had lived together twenty-eight years, and he spoke to her, and immediately after the shooting she said she was sorry she had not killed him; evidence examined and *held* that a judgment of divorce in defendant's favor was justified.

2. ———: ———: ———: FORMER SUIT: BAR TO ACTION. In a suit for divorce by a husband against his wife on the ground of adultery, the evidence tended to show that if she had committed the act he had connived at the adulterous intercourse by arranging for the time and place where the act was committed, and for that reason he was not entitled to divorce. Afterwards she sued for divorce, and he filed a cross-bill alleging cruelty since the termination of the first suit: *Held*, that the decision in the first case was no bar to the second suit, providing his conduct had since been of an exemplary character.

3. ———: ———: ———: ———: TRESPASS. Where after a husband and wife had separated she continued to live in his house with their two minor children, and a bill was sent to him for some plumb- she had had done, he was not a trespasser in going to the house to examine the work before paying the bill.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough*, Judge.

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AFFIRMED.

Bass & Brock and *H. A. Loevy* for appellant.

(1) *Volenti non fit injuria.* Respondent was alone to blame. But for his unauthorized entry into the house without knocking he would not have been shot at. Doyle v. Doyle, 26 Mo. App. 545. (2) Respondent was a trespasser and must take the consequences. Denver v. Harris, 122 U. S. 597; Westcott v. Arbuckle, 12 Ill. App. 577; Sampson v. Henry, 11 Pick. (Mass.) 379. The house was appellant's castle and she had the right to resist his entry if she was alarmed or afraid of injury to the house or assault on her person. 1 Bishop New Crim. Law, 1892, par. 858; State v. Kennade, 121 Mo. 414; State v. Reed, 154 Mo. 129; State v. Taylor, 143 Mo. 150. Even if it afterwards appears that there was no occasion for her resistance or resort to arms. Morgan v. Durfee, 69 Mo. 477; Nichols v. Winfrey, 79 Mo. 544, 547; 90 Mo. 403, 406, Ib.

Jesse A. McDonald for respondent.

(1) A single act of gross cruelty is sufficient cause for a divorce. A deliberate and unprovoked attempt by one upon the life of the other surely warrants a dissolution of their marriage. Doyle v. Doyle, 26 Mo. 545; 1 Nelson on Div. and Sep., sec. 268; Huilker v. Huilker, 64 Tex. 1; Beyer v. Beyer, 50 Wis. 254. (2) The appellate courts pay great deference in divorce cases to the findings of facts by the trial courts, which see the witnesses and observe their demeanor, and if the findings are supported by a preponderance of the evidence, they will be upheld. Miller v. Miller, 14 Mo. App. 424; Owens v. Owens, 48 Mo. App. 212; Griesedeick v. Griesedeick, 56 Mo. App. 94; Rawlins v. Rawlins, 102 Mo. 563.

BLAND, P. J.—Plaintiff, on February 26, 1902, filed a petition in the circuit court for a divorce in which

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she alleged thirteen good and substantial grounds therefor. On May 5, 1902, defendant filed his answer and cross-bill. In his cross-bill defendant alleged a dozen or more good grounds for a divorce from plaintiff.

The evidence on the trial was all directed to the proof of but one of the causes for a divorce in the cross-bill, to-wit, "that on August 14, 1899, plaintiff without cause or excuse fired four shots at defendant while he was running away from her in an attempt to escape danger, and that one of the balls so discharged at defendant by plaintiff passed through his body and inflicted a wound from which he was confined to his room for several weeks."

For answer to the cross-bill plaintiff filed a general denial and the following special plea:

"That all the allegations and charges set forth in cross-bill were either set forth in his said petition for divorce hereinbefore referred to or existing at the time he filed his said petition for divorce and could have been included by him in his said petition as reasons and causes entitling him to a divorce; that by decree of the St. Louis Court of Appeals which finally disposed of the said petition and suit and all the charges therein made by defendant against plaintiff all the said matters and issues set forth in the said petition and those which existed at that time and were not set forth in said petition and which are now set forth by defendant in his cross-bill herein, have become determined and adjudicated against defendant herein and he should not now be heard to plead and maintain the same.

"Plaintiff admits that on August 14, 1899, she shot at defendant and states that she fired at him because he was trying to forcibly enter her room. That at defendant's instance a warrant was issued for plaintiff's arrest by the St. Louis Court of Criminal Correction for the alleged offense of so shooting at defendant, and that upon a trial of said charge plaintiff was acquitted and discharged by said court."

The reply to the answer to the cross-bill admitted the former adjudication.

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A rule was made on plaintiff to furnish security for costs. She failed to comply with this rule and her petition was dismissed. No exceptions were saved to this ruling and the cause was tried on the cross-bill, the answer thereto and defendant's reply.

After hearing the evidence the court awarded a decree of divorce in favor of defendant from which, after an unsuccessful motion for new trial, plaintiff appealed.

The evidence is, that in October, 1898, plaintiff and defendant separated and have not lived together as man and wife since that date. Prior to the bringing of the present suit the defendant unsuccessfully prosecuted a suit against his wife (plaintiff herein) for a divorce to a final determination in this court (Torlotting v. Torlotting, 82 Mo. App. 192). On the trial of the present case the court confined the evidence, in respect to the conduct of plaintiff, to what had occurred since the final termination of the former suit.

The evidence is, that the parties were married in 1871, and that they had five children, all of whom are of age except two; that defendant owned a residence on Dickson street, in the city of St. Louis, where he and his wife had resided prior to the separation and where, after the separation, his wife continued to reside with the two minor children; that in August, 1899, plaintiff had had some plumbing work done on the premises and the bill was presented by the plumber to defendant for payment. He testified that after this bill was presented to him, and on the fourteenth day of August, he went to the premises with the view of inspecting the property before paying the bill; that when he arrived at the house he found all the doors closed and the outside blinds to the windows closed with the exception of one in the kitchen immediately over the sink where the plumbing work had been done; that the lower sash of this window was up and that there was a wire screen in the window; that he saw a little girl in the yard and asked her if there was any one in the house or at home and she told him she thought not; that he then went to the window

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that was open and raised the wire screen for the purpose of seeing the plumbing work; that as soon as he had raised the same and stuck his head in the window a shot was fired at him by his wife from the door; that he then ran out at the yard gate and his wife ran after him and fired two shots at him one of which struck him near the hip and passed through his body.

Other witnesses, who saw the transaction or a part of it, testified that the defendant ran down the street after getting out through the gate and that his wife ran to the gate and shot at him as he ran.

Defendant testified that while his wife was shooting at him he turned towards her and called her a vile name; that his only purpose in going to the premises was to look after the plumbing work and see if he could not find some of his clothes that he thought might be in a shed near the house.

The shooting was done in broad daylight.

A short time after the shooting plaintiff was arrested and taken to the police station. Her son followed her with a view of making arrangements to have her bailed out. In a conversation with him at the station she stated to him that "she was sorry that she didn't kill him and end all the troubles." This same witness testified that his mother had made threats prior to this that she would kill the defendant.

Plaintiff testified that she was in her room sewing; that the outside shutters to all the windows were closed except the one in the kitchen; that the sash to that window was down and there was a wire screen in it; that she heard the sash raised and listened for a moment and heard someone trying to get in the window; that she got the pistol and went to the door leading from the dining room to the kitchen and as she opened it she saw a man with one leg in the window, his foot on the sink and his body about half way in the window; that she did not see enough of him to know who he was and that she fired at him and he ran; that she went out after him as far as the gate and fired two or three shots; that she

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did not know it was the defendant she was shooting at until after the shooting was done.

She introduced witnesses, for whom she had worked and who visited her house very frequently, who testified that her conduct since the disposal of the former divorce suit had been in every respect correct and ladylike.

In the former suit the charge against the plaintiff was that she had been guilty of adultery. The evidence in that case tended to show that if she had committed the adulterous act her husband had, by arranging for the time and place where the act might be committed, connived at the adulterous intercourse and for that reason was not entitled to a divorce, and the decision in that case should have no influence in the determination of this one, providing the conduct of the defendant has since been of an exemplary character and the evidence shows that he has not been guilty of any act or acts which would deprive him of the right of divorce on account of the cruel treatment he received at the hands of his wife on August 14, 1899.

There is no evidence in the record of any communication whatever between defendant and his wife since the termination of the former suit until the happenings on August 14.

It is contended by plaintiff that defendant was guilty of a trespass in going upon the premises and undertaking to enter them through the window. We doubt if the evidence makes out proof of a trespass. The premises were defendant's. As far as the evidence discloses his wife was remaining there by his permission. The object for which he visited the premises was a legitimate one, to-wit, to ascertain whether or not the plumbing work had been properly done for which he was called on to pay. His evidence further shows that had he known or suspected that the plaintiff was in the house at the time he would not have undertaken to look in at the window or enter the premises for the reason, as he stated, that she had threatened to shoot him and

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he was afraid that she might do so if she had the opportunity.

The evidence of the plaintiff that she did not know at whom she was shooting is hardly creditable and can not be given much weight in view of the fact that she did know, before the defendant had gotten beyond hearing, that it was the defendant she had shot and she said nothing. What she stated to her son in a very short time after the shooting that "she was sorry that she didn't kill him and end all the troubles," is inconsistent with her evidence that she did not know that it was her husband at whom she was shooting. Her previous threats to kill him if she had an opportunity, and her expression of regret that she had not killed him when the opportunity was offered, and her long acquaintance with the defendant by having lived with him for twenty-eight years as his wife, makes it extremely improbable that she did not know, the moment she cast her eyes upon the defendant, who he was, and we think the evidence shows beyond any peradventure that, without cause, she willfully and deliberately fired at him with an intent to kill. It is useless to say that such conduct is cruel and inhuman and entitled defendant to a divorce.

There being nothing in the record which shows or tends to show that defendant had been guilty of any misconduct since he brought the former suit for a divorce, we affirm the judgment. *Barclay* and *Goode, JJ.*, concur.

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RICHARD T. BROWNRIGG, Respondent, v. GEO. P. MASSENGALE et al., Appellants.

St. Louis Court of Appeals, December 9, 1902.

1. **Attorney and Client:** ACTION FOR SERVICES: PETITION: PLEADING: EVIDENCE. Where, in an action by an attorney for services, the petition alleged that he was engaged to investigate the title of certain land in Louisiana, and that he began the investigation by examining the laws of such State, and by corresponding with the owner of the lands, and by examining a deed tendered, plaintiff was not limited by such petition to a recovery for services in examining the laws of Louisiana, but was entitled to recover for all services in the investigation of the title to the lands.
2. ———: EXPERT TESTIMONY: INSTRUCTION: HARMLESS ERROR: PRACTICE, APPELLATE. Where, in an action for attorney's services, the court charged that, if they should find such a sum as, considering all the circumstances, they believed was the reasonable value of his services, error in refusing an instruction that the jury were not bound by the testimony of experts as to the value of such services, was harmless.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

AFFIRMED.

Joseph A. Wright for appellants.

(1) The testimony of attorneys as to the value of legal services rests upon the same basis as other expert testimony, should be received with the same caution, and should not control the judgment of the jury so as to preclude them from exercising their own knowledge and ideas upon the value of such services. To refuse such an instruction is reversible error. Cosgrove v. Leonard, 134 Mo. 419; State v. Witten, 100 Mo. 525; Fullerton v. Fordyce, 144 Mo. 519; Hull v. St. Louis, 138 Mo. 618. (2) Instructions fully covering defendant's theories of the case should be given if requested. It

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is likewise true that the instructions given by the court of its own motion ought neither direct the attention of the jury to a cause of action not stated in the petition, nor permit a recovery for services other than those specified in the petition. Warder v. Seitz, 157 Mo. 140; McCarty v. Rood Hotel Co., 144 Mo. 397; Summers v. Life Ins. Co., 90 Mo. App. 691; Colliott v. American Mfg. Co., 71 Mo. App. 163; Hinckley v. Krug, (Cal. 1893) 34 Pac. 118.

Claud D. Hall for respondent.

(1) The weight of expert testimony is, as of other testimony, for the jury; and if expert testimony is before the jury in unexceptional form, it is not reversible error to refuse a mere cautionary instruction in respect to same. Head v. Hargrave, 105 U. S. 45; Cosgrove v. Leonard, 134 Mo. 419; Rose v. Spies, 44 Mo. 20; Fullerton v. Fordyce, 144 Mo. 521; State v. Witten, 100 Mo. 525. (2) An attorney is entitled to reasonable compensation where there is no contract fixing the price of his legal services. Rose v. Spies, 44 Mo. 20; Musser v. Adler, 86 Mo. 445.

BLAND, P. J.—1. After alleging formal matters the petition proceeds as follows:

"Plaintiff, for his cause of action, states that on or about October 10, 1899, he was engaged by the defendants to render certain legal services; to investigate the title to about thirty-five hundred acres of land, located near the town of Floyd in the State of Louisiana, and which was purported to be owned by one B. W. Griffith of the city of Vicksburg, Mississippi; that the defendants had contracted with the said B. W. Griffith to purchase said lands for seventy-five cents per acre, or two thousand six hundred and fifty dollars.

"The plaintiff says that immediately after his employment by the defendants as aforesaid, he began the investigation of the title to said lands by examining the laws of the State of Louisiana relative to conveyances,

and by corresponding with the said Griffith and others, and examining a certain deed for said lands which said Griffith had made and tendered to the defendants. That the said examination of title was carried on for a period of several days, during which time plaintiff frequently advised the defendants of the progress made in said examination. The plaintiff says that immediately after his employment by the defendants as aforesaid, he advised the defendants that it would be unsafe for them to purchase said lands because the said Griffith did not have and could not make a good title to same, and that the said deed tendered by said Griffith to defendants as aforesaid was not a warranty deed and did not convey the said lands it purported to convey. The plaintiff says that at all times during his investigation of the title to said lands he advised the defendants that the title was defective and that it would be unwise to purchase same.

"Plaintiff says that the services he rendered the defendants aforesaid, in advising defendants that the title to said land was defective, and that the investigations conducted by him were and reasonably are worth the sum of two hundred and fifty dollars; that the defendants promised and agreed to pay the same, but though often thereto requested, they have failed and refused and still fail and refuse to pay the same or any part thereof. Plaintiff says he made demand of payment of said sum of two hundred and fifty dollars on the seventeenth day of November, 1900.

"Wherefore, plaintiff prays judgment against the defendants in the sum of two hundred and fifty dollars with interest from the seventeenth day of November, 1900, and for costs of suit."

The answer was a general denial.

The issues were tried by a jury, who found for the plaintiff and assessed the damages at the amount sued for with six per cent interest thereon from the date of demand of payment. A timely motion for new trial was filed by defendants which the court overruled and defendants appealed.

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The evidence is that the defendants are a co-partnership doing business in the city of St. Louis. Prior to the employment of plaintiff by defendants, negotiations had been pending between them and W. B. Griffith, of Vicksburg, Mississippi, for the purchase by defendants from Griffith of about 3,500 acres of land near the town of Floyd, in the State of Louisiana, at seventy-five cents per acre. Negotiations had gone so far that Griffith had executed a deed to George Massengale, one of the defendants, for the land and forwarded it to the Merchants' Laclede Bank of St. Louis, with a draft attached for $2,625, the purchase price of the land. George Massengale was notified by the bank of the reception of the deed and draft about October 10, 1899. He then employed the plaintiff and sought his advice as to the sufficiency of the deed to warrant the title to the land and whether or not it would be safe to accept the deed and pay the draft. At the request of plaintiff, George Massengale procured the deed from the bank for examination and submitted it to the plaintiff, who, after examining it, advised Massengale that the deed did not warrant the title; that it referred to a prior sheriff's deed (not produced) upon which the Griffith title purported to be based and to a mortgage of $500 on a portion of the land. On this advice defendants declined to pay the draft and take the deed. At the request of George Massengale plaintiff gave his opinion in writing in respect to the deed. This opinion Massengale forwarded to Griffith.

A considerable correspondence was thereafter had between plaintiff and Griffith and defendants and Griffith, in respect to Griffith's title, and plaintiff was frequently consulted about the matter by George Massengale. Plaintiff also had correspondence with J. D. Hedrick, clerk of the district court at Floyd, in respect to the record title to the land and made a slight examination of the Louisiana laws in regard to conveyances of real estate or fixed property. The result of this correspondence and of Griffith's investigation of his title

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disclosed that he had title to only an undivided two-sixths of the land and a possible title to another undivided one-sixth. After this discovery was made Griffith offered to sell his interest in the land to defendants for $1,100. Defendants were very anxious to get possession of the land on account of the valuable timber standing on it and when the offer of Griffith to sell his interest for $1,100 was made, George Massengale consulted the plaintiff as to the advisability of purchasing and wanted to know whether the defendants, if they got Griffith's title, could take possession of the land and take off the timber. Plaintiff advised them that if they did they would have to pay the other owners for their interest in the timber. On this advice defendants refused to purchase and made a demand on Griffith for damages. This demand was unproductive of results.

Plaintiff introduced four reputable attorneys at law, as expert witnesses as to the value of his services, all of whom heard plaintiff's evidence and testified that his services were well worth what he charged ($250). Defendants did not deny the employment of plaintiff, nor that he rendered services, but George Massengale testified that plaintiff agreed to take one-half of the damages he could recover of Griffith in full compensation for his services. Plaintiff emphatically denied that he made any such agreement and the facts and correspondence make it appear extremely improbable that any such arrangement was agreed to. Defendants offered no evidence as to the value of the plaintiff's services.

Defendant's counsel went into a very lengthy cross-examination of plaintiff for the purpose of showing the extent of his (plaintiff's) examination and knowledge of the laws of Louisiana and now contends that the suit is for services for the investigation of the laws of that State. This is too narrow a view of the petition; that instrument is much broader than defendants' counsel is willing to admit. The suit is for services rendered in the investigation of title to lands in Louisiana. This

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investigation incidentally involved some investigation of the laws of that State pertaining to the conveyance of lands. Plaintiff's services were rendered, as he alleges in the petition, to investigate the title to the lands. They were beneficial to the defendants and they should pay what they are reasonably worth in the absence of any express agreement for compensation.

The jury were instructed to find for plaintiff, if there was no agreement for compensation, and find for defendants, if they believed plaintiff agreed to be compensated out of damages to be recovered of Griffith.

2. Defendants asked, but the court refused, the following instruction:

"6. The court instructs you that the evidence given by attorneys as to the value of plaintiff's services does not preclude you from exercising your own knowledge upon the value of such services. It is your duty to weigh the testimony of the attorneys as to the value of plaintiff's services, if any, by reference to their nature, the time occupied in their performance, and other attending circumstances, and you may apply to it your own experience and knowledge, if any, of the character of such services."

That the testimony of experts is only advisory, and that the jury is not required to surrender their judgment or to give a controlling influence to the opinion of expert witnesses, but may exercise an independent judgment from their own knowledge and experience, is well-settled law here and elsewhere. Cosgrove v. Leonard, 134 Mo. 419; The State v. Witten, 100 Mo. 525; City of Kansas v. Street, 36 Mo. App. (K. C.) 666; The W. U. Tel. Co. v. Guernsey & Scudder Light Co., 46 Mo. App. (St. L.) 120; Head v. Hargrave, 105 U. S. 45; Randall v. Packard, 142 N. Y. 47; Rogers on Expert Testimony, sec. 204. It was error to refuse the instruction, for which the judgment should be reversed, unless the error is cured by other instructions given by the court.

The jury were instructed that they were the sole

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judges of the credibility of the witnesses and the weight to be given to their testimony and that:

"3. If your verdict is for the plaintiff you will find for him in such sum as considering all the circumstances in evidence you believe is the fair and reasonable value of his services, together with interest thereon at the rate of six per cent from the date of any demand you may believe was made of defendant by plaintiff for payment."

Strictly speaking this instruction excluded the expert testimony from the consideration of the jury in estimating the damages. But they were told to take into consideration all the circumstances in evidence and from these to give plaintiff what they (the jury) believed would be a fair and reasonable compensation for his services. The circumstances in evidence were the employment and the nature and extent of the professional services rendered by plaintiff. The expert evidence did not prove, or tend to prove, all or any one of these circumstances and if the jury were guided solely by the instruction they measured the damages (compensation) by their own experience and knowledge of the value of the services and not from the opinion of the expert witnesses, and we will not assume that under such an instruction the jury did not exercise an independent judgment in estimating the damages, but will assume that they were guided solely by their own judgment and experience in like matters and hold the error in refusing the instruction was cured by the one given. The evidence as to the value of the services was all one way and the facts and circumstances in evidence show that the amount awarded by the jury was reasonable and just.

The judgment is affirmed. *Barclay* and *Goode*, *JJ.*, concur.

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HUMPHREY FULLERTON, Trustee, etc., Appellant, v. JAMES M. CARPENTER, Respondent.

St. Louis Court of Appeals, December 9, 1902.

1. **Jury**: COURT: EVIDENCE: PRACTICE, TRIAL: PRACTICE, APPELLATE. The jury, or the court sitting as a jury, is the sole judge of the weight of the evidence, and their findings will not be reviewed on appeal, unless there is no substantial evidence to support the verdict or it is obvious that the verdict is the result of passion, prejudice or corruption.

2. **Objection to Admission of Evidence**: PRACTICE, APPELLATE. Unless the ground of an objection to the admission of evidence is specified when it is made, the objection will not be considered on appeal.

3. **Practice, Trial**: INSTRUCTION: MOTION FOR NEW TRIAL: ERROR: ASSIGNMENT OF ERROR: PRACTICE, APPELLATE. Where the attention of the trial court is not called to an instruction given by the court, in the motion for a new trial, plaintiff must be deemed to have waived his objection to it, and this assignment of error can not be considered by the appellate court.

4. **Evidence**: In the case at bar there is abundant evidence to support the verdict.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz,* Judge.

AFFIRMED.

Henry M. Post for appellant.

(1) Suit was brought by the principal—who was also owner of the land—against the broker, for $225 held back by him as commissions and the Court of Appeals held that the broker was entitled to his commissions out of the earnest money. The court said: "Plaintiff's counsel make the argument that, although a valid contract of sale was made by the defendant with Symmes, yet, if Symmes failed without any fault on the

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part of the plaintiff to perform the contract, the defendants were not entitled to their commissions. This position is at war with the Missouri laws on the subject. The whole tenor of the decisions of both Courts of Appeals, and the Supreme Court, is to the effect that the real estate agent has performed his whole duty under the law, and is, therefore, entitled to his commissions, whenever he finds and produces a purchaser ready and willing to buy according to the terms agreed on; or when he procures a valid contract of purchase from a solvent buyer," citing Carpenter v. Rynders, 52 Mo. 278; Bailey v. Chapman, 41 Mo. 536; Love v. Owens, 31 Mo. App. 501; Gaty v. Foster, 18 Mo. App. 639; Nesbit v. Hesler, 49 Mo. 383; Hayden v. Grillo, 35 Mo. App. 653. "The agent in such a case is entitled to his commissions, though the trade was afterwards broken off on account of a defect in the seller's title." Collins v. Fowler, 8 Mo. App. 588; Love v. Owens, supra; Budd v. Teller, 52 Mo. 238. (2) There is a class of cases where, under the terms of the contract, the owner of the property had agreed to take certain steps to straighten or complete the title and failed to carry out his contract and by reason of his fault in failing to do so the deal falls through; in such cases the agent is held entitled to his fees. Phister v. Gove, 48 Mo. App. 455.

T. K. Skinker for respondent.

(1) The first assignment is that the "verdict and judgment are against the law." This is too indefinite. It did not indicate to the trial court, and does not indicate to this court, even in the most general way, in what the supposed violation of law consists. The trial court was entitled to have this distinctly pointed out, and this court will not review the action of that court, because that was not done. R. S. 1899, sec. 640. (2) In assigning errors in a motion for a new trial, "the appellant should put his finger upon the specific errors of which he complains." Huppert v. Weisgerber, 24 Mo. App. 95. "He must so definitely set out the rea-

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sons as to direct the attention of that (the trial) court to the precise error of which complaint is made." Stone v. Wolfskill, 59 Mo. App. 441. (3) The appellate court will not review errors alleged to have been committed by the trial court in the progress of the trial, "unless the attention of that court is specifically called to the errors in a motion for new trial." Bollinger v. Carrier, 79 Mo. 318; Railroad v. Vivian, 33 Mo. App. 583.

BLAND, P. J.—The motion for new trial is as follows:

"Now comes Humphrey Fullerton, testamentary trustee, plaintiff in the above entitled cause, and moves the court to set aside its verdict and decree rendered in the above entitled cause heretofore, to-wit, on July 5, 1901, and grant him a rehearing and new trial. And as grounds for said motion plaintiff alleges the following:

"1. Said verdict and judgment are against the law.

"2. They are against the evidence.

"3. They are against the law and the evidence.

"4. They are against the weight of evidence.

"5. Said verdict and judgment should have been in favor of plaintiff and against defendant.

"6. The court erred in excluding proper evidence.

"7. The court erred in admitting improper evidence.

"8. It is admitted by the pleadings that defendant Carpenter was to be paid $2,500 commission for procuring a loan of $100,000. The evidence shows that said defendant as agent for plaintiff made offer to the St. Louis Trust Company of the mortgage on the McPherson tract of land belonging to the estate of J. S. Fullerton and referred to in the evidence, as security for the loan to be made by the St. Louis Trust Company to plaintiff; that said Carpenter made no further offer. The evidence shows that said offer was positively and finally refused by said trust company. The evidence

further shows: (a) That said loan was not given until an order and decree were entered by the St. Louis Circuit Court authorizing and empowering plaintiff, as trustee under the will of J. S. Fullerton, to give said mortgage: (b) That said order and decree were the *sine qua non* conditions for obtaining said loan, and without which said order and decree said loan would have been refused: (c) The evidence shows that all the negotiations and agreements relating to the procurement of said order and decree originated, and were carried on, by and between plaintiff and his attorney on the one part and the St. Louis Trust Company and its attorney on the other part after the offer of said Carpenter had failed, and wholly independent of said Carpenter; that he neither procured nor suggested the proceedings for obtaining said order and decree nor had he anything to do with the agreement compassing said proceedings and order and decree. Plaintiff was not bound, directly or by implication, under his contract with defendant to obtain said order and decree. If defendant failed to procure said loan, then under the case as made by the pleadings he was entitled to no compensation. The court should have found the above recited facts and conclusions by verdict and judgment for plaintiff. By its verdict and judgment for defendant it must have found to the contrary, and said verdict and judgment constituted manifest error for which plaintiff is entitled to rehearing and new trial of said cause."

The first, second, third, fourth and fifth grounds of the motion amount to this, that the verdict is against the weight of the evidence and for that reason should have been for the plaintiff. The jury, or the court sitting as a jury, is the sole judge of the weight of the evidence and their findings will not be reviewed on appeal, unless there is no substantial evidence to support the verdict, or it is obvious that the verdict is the result of passion, prejudice or corruption. Culbertson v. Hill, 87 Mo. 553; Hull v. Railroad, 60 Mo. App. (K. C.) 593.

In respect to the sixth ground, "that the court erred in excluding proper evidence," we find but one object-

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ion made by plaintiff to the evidence offered by defendant. The bill of exceptions shows that the evidence was simply "objected to." No grounds for the objection were assigned nor was any exception saved to the ruling of the court on the objection. Unless the ground of an objection to the admission of evidence is specified when it was made, the objection will not be considered on appeal. Lumber Co. v. Rogers, 145 Mo. 445; Kansas City v. Oil Company, 140 Mo. 458.

In respect to the seventh ground, "that the court admitted improper evidence," the bill of exceptions fails to show that any evidence was admitted by the court to which plaintiff saved an exception.

Only one instruction was given. This was objected to when given, but the court's attention was not called to it in the motion for new trial. By not calling the attention of the court to the instruction in the motion for new trial plaintiff must be deemed to have waived his objection to it and this assignment of error can not be considered. State v. Nelson, 101 Mo. 477; State to use v. Fargo, 151 Mo. l. c. 285; Brady v. Connelly, 52 Mo. 19; Brown v. Mays, 80 Mo. App. (K. C.) 81; Roberts v. Boulton, 56 Mo. App. (St. L.) 405.

The other grounds set out in the motion are directed to the evidence and to the sufficiency of the evidence to support the verdict of the court. In this state of the record the only question open for review is whether or not there is substantial evidence to support the verdict.

The agreed facts are that Gen. J. S. Fullerton, in his lifetime, owned a lot on the corner of Seventh and Pine streets, in the city of St. Louis, and other real estate in said city; that in 1896 he had contracted for the erection of a twelve story brick, stone and iron building on the lot on Seventh and Pine streets and had placed a mortgage on the property for $225,000; that in the year 1897, when the building contracted tor was about half completed Gen. Fullerton lost his life in a railroad accident. He had made a will in which the plaintiff, his brother, was named as executor and trustee. For

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the preservation of the estate it was imperative that the Fullerton building should be completed, and the probate court of the city of St. Louis granted an order authorizing plaintiff, as executor, to finish it, but the estate had no funds available for the purpose.

The defendant, James M. Carpenter, was the agent of the estate at the time, for the collection of rents, etc., and was consulted by plaintiff and his attorney, Truman A. Post, Esq., in respect to raising a loan of $100,000 on the property of the estate, and suggested to defendant that his firm (James M. Carperter & Company) might advance the money on a blanket mortgage on all of the Fullerton real estate in the city of St. Louis. Carpenter thought he could negotiate the loan at six per cent if the plaintiff, as executor, could make a valid mortgage. Mr. Post assured him that the executor had the power, under the will, to make the mortgage and defendant agreed to undertake to negotiate the loan for a commission of two and one-half per cent, and it was agreed that Mr. Post should furnish Carpenter his opinion in writing that the plaintiff, as executor, had power under the will to mortgage the real estate. Mr. Post's opinion in writing was furnished on June 25, 1897, and Carpenter started out thus fortified to find some one who would loan the money ($100,000) on the security offered. After making several unsuccessful applications to other parties, Carpenter applied to the St. Louis Trust Company for the loan. The application, accompanied with Mr. Post's opinion, was submitted to its attorney, Mr. Stewart. Mr. Stewart procured a copy of Gen. Fullerton's will and after examining it was of the opinion that the executor did not have the power to make the proposed mortgage and so informed Carpenter and asked him to bring Mr. Post over and they would discuss the matter. Carpenter brought Post to the office of the St. Louis Trust Company, where Post and Stewart had an animated discussion about the matter, but Post was unable to convince Stewart that the executor had power to execute the mortgage. Subsequently other conferences were had, in respect to the

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matter, between Post and Stewart. These conferences finally resulted in a petition in equity to the circuit court for authority of the executor to execute the mortgage and borrow the $100,000 for the purpose of finishing the Fullerton building. The prayer of the petition was granted and an appropriate decree was entered authorizing and empowering the executor to borrow the money of the St. Louis Trust Company and to mortgage the property as surety therefor, and this was done.

Stewart testified that when he examined the will, the application of Carpenter for the loan was declined, and that it was not taken up again until sometime afterwards, when, in a conversation with plaintiff, the matter was mentioned in discussing the condition of the estate, and then, on account of his acquaintance with and friendship for Gen. Fullerton in his lifetime and his sympathy for his minor daughter, he again took the matter up with Mr. Post with a view of devising some means whereby the loan could be made.

Carpenter testified, in effect, that the loan was not turned down by Stewart after he had examined the will and come to the conclusion that the executor had no power to make the mortgage, but the application for the loan was held in abeyance until some means could be devised whereby the executor might make a valid mortgage.

Carpenter continued to act as agent for the Fullerton estate for several years after the loan was made. When his agency was terminated by the plaintiff, Carpenter in his settlement with plaintiff, as executor of the estate, charged the estate with and retained $2,500 as commission for negotiating the loan of $100,000 with the St. Louis Trust Company. The suit is to recover this sum on the theory that Carpenter did not procure the loan.

The evidence is clear that the defendant found a party that was ready and willing to make the loan on the security offered, had the executor possessed the power to execute the mortgage that Carpenter was authorized to offer as security for the loan, and that the

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only reason the loan was not made at the time was because the borrower was, in the opinion of Stewart, unable to make the security he proposed to give. We can see no difference in principle, as far as the broker is concerned, in a negotiation of this character, between an incapacity of the borrower to execute the mortgage offered as security and a want of title in him to the lands proposed to be mortgaged as security.

We do not understand from the contract, as testified to by all the parties, that Carpenter undertook to get the loan on Mr. Post's opinion that plaintiff had power as executor to make the mortgage, but that he undertook to procure the loan on the property when assured in writing by Mr. Post, plaintiff's attorney, that plaintiff could make the mortgage. This representation or assurance was not Carpenter's, but plaintiff's, made through his attorney. That this assurance failed to satisfy the lender, who was ready and willing to make the loan on a valid mortgage, was not the fault of Carpenter but the error (if error it was) of plaintiff's attorney for which defendant was not at all responsible and on account of which he should not lose his commission.

The evidence for defendant further shows that defendant was often consulted by plaintiff in respect to the loan while the equity case was pending in the circuit court and that, on account of his familiarity with the property and his superior knowledge of the value of such property in the city of St. Louis, his evidence was mainly relied upon by plaintiff to secure the necessary decree to authorize plaintiff to make the mortgage.

In our opinion there is abundant evidence in the record to support the verdict of the court, and the judgment is affirmed. *Barclay* and *Goode, JJ.*, concur.

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THE N. K. FAIRBANK COMPANY, Respondent, v. THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY, Appellant.

St. Louis Court of Appeals, December 9, 1902.

1. **Bonds:** CONDITIONS: CONTRACTS: SURETY: SURETY COMPANY. A bond of a surety company was conditioned that if the principal, a corporation, "shall in any manner or by any means, misuse, misappropriate, or misapply said paper or plates," to be furnished by the obligee, "or in any manner dispose of the same, or convert them to their own use, amounting to larceny or embezzlement of paper or plates, then this bond to be of full force." The principal appropriated to its own use a large amount of paper furnished by the obligee, and in an action on the bond the surety claimed that, as a corporation could not commit larceny or embezzlement, the surety was not liable. *Held*, that the effect of the bond was to raise a liability in two contingencies: first, if the principal should in any manner misappropriate or misapply the paper; and, second, if it should in any manner, amounting to larceny or embezzlement, dispose of the same or convert it to its own use.

2. ——: ——: ——: ——. Plaintiff contracted with a printing company to print certain wrappers or plates, and with paper to be furnished by plaintiff. The company furnished a bond to indemnify plaintiff against loss by the misappropriation or misuse of any part of the paper or plates so furnished. As each lot of paper was delivered a written agreement was entered into by plaintiff and the company, whereby it acknowledged the receipt as bailee of the paper then delivered, and agreed to print and restore the identical paper as wrappers to the plaintiff as ordered, and, so long as any of the paper remained in such company's possession, it continued to be the property of plaintiff. Before making such auxiliary agreements, the attorney in fact of the surety on the bond was notified thereof, and asked if he had any objection to the form and conditions therein contained, and he answered that he had not. *Held*, that the original contract was not changed, nor the responsibility of the surety increased, by such auxiliary agreements, and the surety was not relieved thereby.

Appeal from St. Louis City Circuit Court.—*Hon. D. D. Fisher*, Judge.

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AFFIRMED.

Johnson, Houts, Marlatt & Hawes for appellant.

(1) The larceny or embezzlement of $858.19 is, under our statute, a felony. R. S. 1899, secs. 1914, 1899. (2) Corporations can not, in the very nature of things, be guilty of a felony. Clark & Marshall on Priv. Corp., p. 656, and cases cited; Cook on Corp., sec. 15d; 7 Am. and Eng. Ency. of Law (2 Ed.), p. 844; State v. Railroad, 23 Ind. 362; State v. Milling Co., 20 Me. 41; Power Co. v. Bethel Co., 64 Me. 441; Commonwealth v. Swift Run Co., 2 Va. Cas. 362. (3) Our statutes defining larceny and embezzlement include only natural persons. R. S. 1899, sec. 1898, 1912, 1914.

J. F. & R. H. Merryman for respondent.

(1) The first question, then, that presents itself is: Was Doggett overreached by Hennings, or was the Hogan Printing Company, a corporation, capable of embezzling the paper in question or committing any act which amounts to a felony? (2) The statute provides (sec. 1914, R. S. 1899): "If any carrier, bailee, or other person, shall embezzle or convert to his own use, etc., he shall, on conviction, be adjudged guilty of larceny and punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken or secreted." (3) In the American and English Encyclopedia of Law (2 Ed.), vol. 7, page 840, it is said: "Whether or not corporations are liable under statutes commanding or forbidding certain acts under a penalty, depends upon the intention of the Legislature, to be ascertained from the language and purpose of the statute. . . . In some of the cases it seems to have been held in effect that, since statutes imposing a penalty are to be strictly construed, they do not apply to corporations unless they are made to do so in express terms, or by the clearest implication. . . . But the better opinion is against such a view

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and to the effect that penal statutes are applicable to corporations, as well as to natural persons, if their language and purpose show an intention to include them. Though corporations may not be mentioned, the word 'person' or 'persons' will include them, if they are within the spirit and purpose of the statute. . . . It seems to have been thought at one time that a corporation was not liable to indictment. But if such a doctrine was ever recognized, it has long since been exploded. It has been shown that a corporation may be liable for the torts of its officers or agents. The same is true to some extent of their criminal acts. A corporation, being impersonal, can not be imprisoned, but it may be punished by fine or by forfeiture of its charter." (4) In the same chapter, on page 845, it is said: "It would seem clear that corporations should be regarded as persons within the meaning of a statute making certain acts by 'any person' a crime, if they are within the purpose of the statute; and so it has been held." (5) Mr. Wharton, in his work on Criminal Law, section 87, says, in speaking of corporations: "No good reason can be assigned why the same acts for which these bodies are subject to civil suit may not equally be the basis of criminal proceedings when they result in injury to the public at large."

GOODE, J.—The N. K. Fairbank Company made a contract with a corporation in the city of St. Louis, known as the James Hogan Printing Company, whereby the company last named agreed to print certain wrappers for the Fairbank company at stipulated prices, the Fairbank company to furnish the necessary stock of paper and the plates. This agreement was made by a written offer submitted by the Hogan Printing Company to the Fairbank Company on the fourth day of May, 1899, and accepted on the twenty-third of that month. Before the respondent would accept the printing company's offer, respondent exacted a bond in the sum of $5,000 as indemnity against loss by the misappropriation or misuse of any part

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of the paper or plates, which the respondent was to furnish to the printing company to be used in making the wrappers. This bond was executed by the Hogan Printing Company, with the appellant, the American Bonding & Trust Company, as surety, and contains the following condition:

"Now, therefore, if the said James Hogan Printing Company shall in any manner or by any means. misuse, misappropriate or misapply said paper or plates, or in any manner dispose of same or convert them to their own use, amounting to a larceny or embezzlement of said paper and plates, then this bond to be of full force and effect; otherwise to be void, conditioned: That said N. K. Fairbank Company shall not hold the said James Hogan Printing Company for any loss that may be occasioned by them owing to destruction by fire, cyclone or any other act of God."

After the execution of the bond, the Fairbank company accepted the offer of the Hogan Printing Company and on several occasions delivered to the latter a large stock of paper to be used in making wrappers. At each delivery of paper the two companies made a contract in regard to it as follows:

"This agreement, made and entered into this ninth day of April, 1900, by and between N. K. Fairbank Company, a corporation, bailor herein, party of the first part, and James Hogan Printing Company, a corporation, bailee herein, party of the second part, witnesseth: this day delivered to the party of the second part, bailee, the following described paper, to-wit: M. F. White, Alkali paper, 500 reams, 36 1-8x46—60 lbs., valued at eight hundred and seventy-three dollars, now in their premises at 314 Elm street, St. Louis, Mo.

"And the said party of the second part, for and in consideration of a certain contract heretofore entered into by and between the party of the first part and party of the second part herein, hereby agrees that from, in and upon said above mentioned paper to print, cut and deliver over and to the party of the first part, as ordered, certain wrappers, and restore said identical

paper, printed and cut into wrappers as aforesaid, to the party of the first part.

"It being expressly understood that, as long as said above-mentioned paper, the property of the party of the first part, remains in the possession of the party of the second part, that it is held entirely by said party of the second part at the risk of the owner, the said party of the first part.

"In witness whereof, the parties of the first and second part hereto set their hand and seal this —— day of ————.

"N. K. FAIRBANK CO., Bailor.
"By DEWEY A. HICKEY,
"Party of the First Part.
"JAMES HOGAN PRINTING CO., Bailee,
"By GEORGE T. DUNN,
"Party of the Second Part."

A good part of the paper delivered to the Hogan company was not used in printing wrappers for the respondent, but was converted by the printing company to its own use and worked up in doing jobs for other persons. It was proven that some three hundred and twenty reams were thus misappropriated by the direct order of the vice-president and general manager of the Hogan Printing Company and two of its other officials.

This action was brought on the bond to recover the value of the misappropriated paper and the answer of the appellant set up the following defenses: First, a general denial; second, that the bond was given after the contract between the Fairbank company and Hogan Printing Company had been made and was therefore without consideration; third, that the original agreement was modified by new agreements of the form above set forth, when deliveries of paper were made to the printing company and that the paper was furnished not under the original, but under the subsequent agreements, by which the appellant was not bound; fourth, that no liability arose on the bond unless the paper was

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converted by the printing company in such a way as to amount to embezzlement or larceny and that, the printing company being a corporation, it could not be guilty of embezzlement or larceny; fifth, that bankruptcy proceedings were instituted against the Hogan Printing Company, in which it was adjudged a bankrupt and a trustee appointed to take charge of its assets, which were more than sufficient to pay the respondent's claim; that appellant requested respondent to prefer its claim against the bankrupt estate in the hands of the trustee, but respondent neglected and refused to do so.

The new matter in the answer was put in issue by a replication.

Evidence was introduced by the respondent proving its case as above stated and, no evidence being offered by the appellant, a judgment was entered against it for the penalty of the bond to be satisfied on the payment of $952.58.

An appeal was taken to this court.

1. As to the defense, that there was no consideration for the bond and the one based on the alleged refusal of the Fairbank company to prove up its claim in the bankrupt proceedings on the appellant's demand, it is sufficient to state that the evidence failed to support them.

The bond was executed and given before respondent would accept the Hogan Printing Company's offer or make any contract with it for wrappers; and instead of appellant demanding that the respondent assert its claim of title to the paper or the value thereof in the bankruptcy case against the Hogan Printing Company, the president of the American Bonding & Trust Company notified the respondent's attorney not to take that step, saying all the appellant asked of the respondent was to furnish appellant's attorney in St. Louis the names of witnesses to be subpoenaed before the grand jury in regard to the conversion of the paper and then the claim in suit would be paid.

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2. The bond does not mean respondent's paper must necessarily have been stolen or embezzled to create a liability on that instrument. Its effect was to raise a liability in two contingencies. If the Hogan company should in any manner or by any means misuse, misappropriate or misapply the paper, or should in any manner amounting to larceny or embezzlement dispose of the same or convert it to its own use. We think the intention of the instrument was to make any misuse or misappropriation of the paper turned over to the printing company by the Fairbank company a breach of the bond, and to protect the bailor against all wrongful acts of the bailee in using the former's property, whether such acts constituted a crime or not. This interpretation is enforced by the last clause of the condition, which exempts the printing company and, of course, its surety, from any loss occasioned by fire, cyclone or other acts of God, thus specifying losses which the bond was not to cover.

3. Neither do we accede to the contention that the contracts in the nature of receipts, entered into by the principal parties when deliveries of paper were made, altered the original contract so as to release the surety, or that the paper was received by the printing company under the subsequent contracts instead of the original one. Those subsequent memoranda emphasized the fact that the paper remained the property of the Fairbank company and bound the printing company to cut it into wrappers and restore the identical paper made into wrappers to the Fairbank company, which was in accordance with and in enforcement of the original agreement and in no way increased the responsibility of the surety.

Besides, Thomas C. Hennings, attorney in fact of the American Bonding & Trust Company and its representative in St. Louis, was notified in writing of the making of said auxiliary contracts and requested to say whether he had any objection to the forms and conditions therein contained, in response to which notice Mr. Hennings said he had no objection to the ad-

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ditional contracts, because the bond only covered embezzlement or misappropriation.

Much is said in the appellant's brief about the favoritism shown to sureties by the law, and that their obligation is *strictissimi juris,* all of which is accurate, since the law began early to deal tenderly with sureties out of consideration for the gratuitous nature of their promises. It is the law that a surety has the right to stand on the strict terms of his agreement; but what his agreement is, is to be determined by the same canons of interpretation applied to other contracts, without technical nicety or strained distinctions. Beers v. Wolf, 116 Mo. 179; State ex rel. v. Tittman, 134 Mo. 162; Harburg v. Kumpf, 151 Mo. 16. If this doctrine is applied to gratuitous sureties it may certainly be applied to a company whose business is to become surety for hire. Appellant was paid to make this bond and a plain liability arose on it which ought to be discharged.

The judgment is affirmed. *Bland, P. J.,* concurs. *Barclay, J.,* not sitting.

STATE OF MISSOURI ex rel. SOLOMON E. WAGGONER et al., Respondent, v. JAS. M. SEIBERT, Excise Commissioner of the city of St. Louis, Appellant.

St. Louis Court of Appeals, December 9, 1902.

1. **Dramshop License:** APPLICATION: AFFIDAVIT: PETITION: EXCISE COMMISSIONER. No affidavit is required to accompany a petition of an applicant for a dramshop license, and an order annulling a license on the ground that an affidavit accompanying the petition was not made by any officer authorized to administer oaths, was erroneous.

2. ———: ———: ———. All jurisdictional facts to authorize the granting of a dramshop license by the county court or excise commissioner must affirmatively appear on the face of the proceedings.

3. ———: ———: ———: JURISDICTION: STATUTORY CONSTRUCTION. Under the provisions of section 2997, Revised Stat-

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utes 1899, as amended by Act of March 13, 1901, excise commissioners have no jurisdiction to grant a dramshop license until the petition has been on file ten days.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

AFFIRMED.

STATEMENT OF THE CASE.

The relators filed in the circuit court of the city of St. Louis a petition for writ of certiorari directed to James M. Seibert, excise commissioner of said city, requiring him to send up the petition of Morgan and Bergman for a license to keep a dramshop at No. 3005 city block No. 1012, on Olive street, in the city of St. Louis, together with all the proceedings had in the office of the excise commissioner pertaining to the granting of said license.

Among other things the petition alleges that the application of Morgan and Bergman for the license was filed on September 24, 1901, and the license was granted on the following day; that a majority of the taxpaying citizens and guardians of minors in the said block did not sign the petition for the license; that said license was issued over the protest of the taxpaying citizens in said block and contrary to law.

To the writ the excise commissioner made the following return, to-wit:

"Respondent admits that he is the duly appointed, qualified and acting excise commissioner of the city of St. Louis, and that as such officer he is vested by law with exclusive authority to grant dramshop licenses in the city of St. Louis, and that his powers and duties are prescribed by law which are substantially as detailed by relators, and this respondent denies each and every other allegation in relator's petition contained, except as hereinafter admitted. . . .

"Further, this respondent says that he investigated or caused to be investigated, the records of the assessor

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in the city of St. Louis for the purpose of ascertaining the total number of assessed taxpaying citizens and guardians of minors owning property in said block 1021, those persons paying taxes upon real estate being ascertained from the plat of said block on file in said assessor's office, and the list of those persons paying taxes upon personal property in said block being ascertained by having a census of said block taken, and by investigation also of the records in the said assessor's office.

"This defendant further says that upon a thorough and careful investigation, he found that the total number of assessed taxpaying citizens and guardians of minors owning property in said block was sixty-three, and that of this number thirty-five of said taxpaying citizens and guardians of minors had signed the said application of said Morgan and Bergman praying that he issue to said Morgan and Bergman a license to keep a dramshop in said city block 1021, at No. 3005 Olive street, and it thereupon appearing to this respondent that said Morgan and Bergman had fully complied with all the provisions of the law a license to establish a dramshop at the premises aforesaid was accordingly issued to them.

"This respondent further says that he received a certain communication relative to the issuance of said license to said Morgan and Bergman, dated October 10, 1901, and signed by Leverett Bell, Esq., as counsel, complaining that the petition of said Morgan and Bergman was insufficient, and this respondent says that after a thorough investigation of each and every allegation therein he was fully satisfied that the said license had been properly granted, and so notified the said counsel for complainants. The said communication and this respondent's reply are set forth in relator's petition, and this respondent further says that no other complaint has been filed herein. . . .

"Further this respondent says that in ascertaining the disposition of the assessed taxpaying citizens and guardians of minors owning property in the block as to the granting of a dramshop license, the signatures at-

tached to the petition are alone considered; the names of the taxpayers not on the petition being held to be against the granting of a license. . . .

"Further, this respondent says that, in the exercise of his duties as excise commissioner of the city of St. Louis, he had heard the evidence and fully considered all the facts in connection with each of the foregoing complaints and found the facts as related, and this respondent respectfully submits that, upon the face of the petition and the proceedings before him, it appears that he has complied with all the provisions of the law relating to the issuance of the license herein complained of, and he, therefore, prays that the writ herein granted be quashed."

On the filing of the return the relators filed the following motion to quash the license:

"Now comes the relators and move the court to cancel and quash the dramshop license granted to E. G. Morgan and H. W. Bergman on September 25, 1901, to keep a dramshop at 3005 Olive street, in the city of St. Louis, in block 1021, because it does not appear on the record of said proceedings that the parties named in said license possess the qualifications required by law of one licensed to keep a dramshop in the city of St. Louis, Missouri."

It was agreed that the relators had made application to the Attorney-General and to the Circuit Attorney of the city of St. Louis to appear and prosecute the proceedings and that both had refused to do so.

The petition for the license, omitting the names of the petitioners, is as follows:

"The undersigned, being a majority of the assessed taxpaying citizens and guardians of minors owning property in block No. 1021, of the city of St. Louis, petition you to grant E. G. Morgan and H. W. Bergman, a license to keep a dramshop at 3005 Olive street, in said block, for twelve months." . . .

"State of Missouri, City of St. Louis, ss.

"E. D. Morgan, being duly sworn, on his oath says that the foregoing petitioners comprise a majority of

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the assessed taxpaying citizens and guardians of minors owning property in block No. 1021 in the city of St. Louis, and that the signatures thereto attached are the personal and genuine signatures of the parties therein mentioned. And affiant further states that he is a law-abiding, assessed, taxpaying citizen of said city, above twenty-one years of age, and that he has not violated the dramshop laws of the State of Missouri, to the best of his knowledge and belief.

(Signed) "MORGAN & BERGMAN, '
"Applicants.

"Sworn to and subscribed before me this 24th day of September, 1901.

"R. P. THOMPSON,
"Deputy Excise Commissioner."

The relators offered to prove that only twenty-four of the taxpaying citizens in the block had signed the petition for the license and that eleven names to the petition were forgeries, that is, written by other persons than those purporting to have written them, and others of them had signed a remonstrance against the issuance of the license; and that deducting the eleven illegal signatures from the whole number there was less than a majority of the taxpaying citizens and guardians of minors in said block signed the petition, which evidence on the objection of the excise commissioner was excluded by the court.

The court found for relators, sustaining the motion to quash the license, on the ground that the law does not authorize the appointment of a deputy excise commissioner and that the person signing himself as such had no authority under the law to administer oaths, and entered judgment annulling the license.

A timely motion for new trial was filed which was by the court overruled and respondent below perfected his appeal.

Marion C. Early for appellant.

Leverett Bell for respondent.

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BLAND, P. J.—1. Neither the dramshop act nor the act creating the office of excise commissioner requires that a petition for a dramshop license shall be verified by the affidavit of the applicant. The only affidavit the applicant is required to file is the one prescribed by section 2994 of the dramshop act. This affidavit has no reference to the petition for the license. Its purpose is to furnish the basis for the assessment of an advalorem tax on the merchandise of the dramshop-keeper. The affidavit made by E. D. Morgan to the petition, and sworn to before R. D. Thompson, as deputy excise commissioner, was *extra judicie.* Not being required by law it did not add to nor detract from the petition or make it any the better or any the worse. It was therefore immaterial whether or not the excise commissioner had authority to appoint a deputy or whether the affidavit was made before an officer authorized by law to administer oaths, and we are of the opinion that the learned circuit judge committed error in annulling the license for the reason that the affidavit to the petition was not made by an officer authorized to administer oaths.

2. It is alleged in the petition for the writ that the petition for the license was filed on the twenty-fourth day of September, 1901, and that the license was issued the following day in violation of section 2997 of the dramshop act (R. S. 1899) as amended by an act of the General Assembly approved March 13, 1901 (Session Acts of 1901, p. 142). By the terms of section 3020, (R. S. 1899) pertaining to a petition for a dramshop license filed with the excise commissioner, section 2997 of the dramshop act must be read into that section (3020) and of course the section as amended by the Act of March 13, 1901.

The amended act requires that the petition for the license "shall be filed in the office of the clerk of the county court not less than ten days before the first day of the court to which it is to be presented, and remain on file for public inspection, and by the said clerk laid before the court at the first term thereafter; and all

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dramshop licenses issued contrary to the provisions of this section shall be void." Writing this amendment into section 3020, supra, it would not be competent for the excise commissioner to issue a license until the petition therefor had been filed in his office and open for public inspection at least ten days before the granting of the license.

The obvious purpose of the amendment requiring the petition to be on file for at least ten days for public inspection before a license shall be granted is to afford the public, whose business, good neighborhood, or peace might be affected by the location of a dramshop in their midst, an opportunity to make protest and to defend their property and personal interests against the proposed dramshop; in other words, to make the public a party to the proceedings and to afford it an opportunity to be heard in opposition to the granting of the license. If this be so then the provision is a jurisdictional one and a license issued on a petition, which had not been on file and open for public inspection for at least ten days, would, in the language of the amendment, "be void."

It has been repeatedly held by this court that all the jurisdictional facts, to authorize the granting of a dramshop license by the county court or excise commissioner, must affirmatively appear somewhere on the face of the proceedings. State v. Police Commissioners, 14 Mo. App. 297; State ex rel. Campbell v. Heege, 37 Mo. App. (St. L.) 338; State ex rel. Reider v. Moniteau Co. Ct., 45 Mo. App. (K. C.) 387; State ex rel. v. Mayor and Board of Alderman of Neosho, 57 Mo. App. (St. L.) 192; State ex rel. v. Higgins, 71 Mo. App. 180. This ruling is supported both on account of the nature of the subject-matter and on the rule that the jurisdiction of inferior tribunals, not proceeding according to the course of the common law, must appear affirmatively on the face of the proceedings. Kidd et al. v. Guibar, 63 Mo. 342; Howard v. Clark et al., 43 Mo. 344; Sanders v. Rains et al., 10 Mo. 770.

The return of the excise commissioner to the writ

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of certiorari shows that the petition for the dramshop license was lodged with him on September 24, and that he immediately notified some of the persons who had signed the remonstrance that he would take the matter up the next day; that he did take it up on the next day, and after investigating the petition ordered the license to be issued upon the payment, by the applicants, of the license tax and the giving of the requisite bond.

This action was not only irregular and premature, but was in excess of the jurisdiction of the excise commissioner. He had no jurisdiction to pass upon the petition and application until the petition had been on file in his office for at least ten days and open to the inspection of the public. For want of jurisdiction to issue the license at the time it was issued, the license is void.

The judgment is affirmed. *Barclay* and *Goode.*, *JJ.*, concur.

C. C. CRAWFORD, Respondent, v. CONDE L. BENOIST et al., Appellants.

St. Louis Court of Appeals, December 9, 1902.

1. **Usury.** Where, at the time of a loan of money, the borrower offered to give his note for $300 on condition that the lender would turn over to him a note of a third party for $50 and interest, and pay him $235, it shows no usury on the part of the lender, though the maker of such note was insolvent.

2. **Evidence:** CHATTEL MORTGAGE: CONVERSION. Where the maker of a chattel mortgage was the tenant of defendant, who knew that he was carrying on his business under the name of Echo Publishing Company, and that under such name he had executed a chattel mortgage to secure a debt, the fact that he thereafter levied on the property covered, and sold it under execution, and purchased the same, made him a purchaser with full notice of the mortgage, and not an innocent purchaser, so that he bought subject to the mortgage, making his retention of the property a conversion, on account of which he was liable to the mortgagee for its value.

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Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferris,* Judge.

AFFIRMED.

John M. Dickson for appellants.

(1) The chattel mortgage to Crawford does not purport on its face to be the deed of A. E. Warrendorf, and is not, as between Warrendorf and his creditors, prior and subsequent, his deed within the meaning of section 3404, Revised Statutes 1899. Mackey v. Cole, 79 Wis. 426. (2) The record shows that Benoist was a judgment creditor of Warrendorf, that the property included in the mortgage was sold by the constable under an execution issued under the judgment. (3) A notice was served upon Benoist that Crawford claimed the mortgage to be the mortgage of Warrendorf, though purporting to be that of the Echo Publishing Company, but it was not served until after the seizure of the property by the constable. Such notice was barren of any legal effect; but if it had any, it could not have any more than that of a prior unrecorded mortgage filed on that day. Mercantile Co. v. Perkins, 63 Mo. App. 315, and cases cited; Collins v. Wilhoit, 108 Mo. 458. (4) The evidence showed Crawford was guilty of usury. A chattel mortgage is absolutely void if the loan purporting to be secured thereby is usurious. Sec. 3710, R. S. 1899; sec. 3709, R. S. 1899.

H. A. Yonge for respondent.

(1) The chattel mortgage executed to Crawford, described by the evidence contained in the record and filed in the office of the recorder of deeds of the city of St. Louis, was executed in the name under which Warrendorf was conducting his business, and was notice to all the world that it was his deed and conveyed the property therein described to Crawford, within the meaning of section 3404, Revised Statutes 1899. (2) The

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record discloses that the property in controversy was seized on an attachment sued out by Conde L. Benoist, appellant, for rent, and subsequently sold under an execution issued on a judgment thereafter obtained in said proceeding. (3) Actual notice was served on Benoist of the existence of the chattel mortgage, shortly after the seizure and before the rendition of the judgment and sale under execution issued thereon. (4) There was no evidence showing or even tending to show that there was usury charged in the promissory note taken by Crawford from Warrendorf, and as the note was not tainted with usury, the chattel mortgage was valid as to all the world, and the question of whether Crawford was guilty of charging usury was not a question of fact in the case to be submitted to the jury. In order to warrant the court in submitting the question that the transaction was a device to evade the statute against usury, there must always be some evidence prima facie, raising such inference. Williams v. Reynolds, 10 Md. 57; Ayrutt v. Chamberlain, 33 Barb. (N. Y.) 229; White v. Stillman, 25 N. Y. 541; McAtee v. Vanlandingham, 75 Mo. App. 45; Keithly v. Southworth, 75 Mo. App. 442. (5) Benoist had due and legal notice that Warrendorf conducted his business at the place in question, and owned the property in the name of the Echo Publishing Company, as shown by the record. Major v. Bukley, 51 Mo. 227; Maloney v. Bacon, 33 Mo. App. 50; Roan v. Winn, 93 Mo. 503.

BLAND, P. J.—The action is for conversion. The petition was in the ordinary form. The answer was a general denial. The verdict and judgment were for the plaintiff from which defendant duly appealed.

The evidence is that one A. E. Warrendorf, in June, 1899, was the publisher of a weekly newspaper, in the city of St. Louis, called the "Echo;" that in the prosecution of his publishing business he used the name "Echo Publishing Company" and had over his door the sign "Echo Publishing Company."

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On June 26, 1899, he executed to plaintiff the following promissory note.

"$300. "St. Louis, Mo. June 26, 1899.

"Three months after date I promise to pay to the order of C. C. Crawford, three hundred dollars—value received, negotiable and payable, without defalcation or discount, with interest at the rate of six per cent per annum from date. Payable at

"THE ECHO PUBLISHING COMPANY,

"By ARNOLD E. WARRENDORF, Manager."

On the same day, to secure the payment of the note, he executed the following chattel mortgage:

"Know all men by these presents, that the undersigned, the Echo Publishing Company, by Arnold E. Warrendorf, manager, of the city of St. Louis, State of Missouri, in consideration of the sum of three hundred dollars to them paid by C. C. Crawford, of the city of St. Louis, State of Missouri, do sell, assign, transfer and set over unto the said C. C. Crawford, his executors, administrators and assigns" (here follows a description of the property, etc.).

The signature of the deed is as follows:

"The Echo Publishing Company, by A. E. Warrendorf, manager."

Attached to the deed is the following affidavit:

"A. E. Warrendorf, being duly sworn on his oath says that the Echo Publishing Company is the legal and absolute owner of the personal property above described and that the same is free from all claims and liens whatsoever.

"A. E. WARRENDORF."

The mortgage was filed for record on June 28, 1899. Subsequent to the filing of the mortgage for record, defendant obtained a money judgment against Warrendorf upon which he sued out an execution and caused to be levied upon and sold the larger part of the property described in the plaintiff's petition and in the mortgage. At the sale William M. Tompkins became the purchaser of the property and afterwards sold it to defendant. Before the sale was made plaintiff gave

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the defendant written notice that he (plaintiff) had a duly-recorded mortgage on the property executed by Warrendorf to secure the note therein described.

In respect to the note of $300, plaintiff testified that he let Warrendorf have $235 in money and a note for $50 on Mr. Fishback, on which there was due $15 interest; that the Fishback note was made to him and signed by Fishback; that Warrendorf was not a security or indorser on the note; that he understood from Mr. Fishback that Warrendorf owed him (Fishback) and had agreed to take up his note in part consideration of the loan.

The Fishback note was several years overdue at the time and defendant offered to prove that the note was worthless; that plaintiff never made any effort to collect it for the reason he knew Fishback to be insolvent. This evidence was offered with a view of showing that plaintiff indirectly exacted usurious interest of Warrendorf. On the objection of plaintiff this evidence was excluded.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant offered instructions in the nature of demurrers to the evidence which the court refused.

At the request of plaintiff, the court instructed the jury as follows:

"The court instructs the jury, that if you shall find from the evidence that Arnold E. Warrendorf was doing business under the name and style of the Echo Publishing Company, Arnold E. Warrendorf, manager, in the city of St. Louis, Missouri, and became indebted to plaintiff, and executed a promissory note to him for the sum of $300, the amount of his indebtedness due plaintiff, in the name of the Echo Publishing Company, Arnold E. Warrendorf, manager, dated June 26, 1899, and also at the same date executed in the same manner a chattel mortgage upon the personal property in controversy to plaintiff for the purpose of securing the payment of said indebtedness, and said chattel mortgage was filed for record in the office of the recorder of the

city of St. Louis, and that said indebtedness is still unpaid, and that subsequent to the filing for record of said chattel mortgage and while the same was of record, one James P. Miles, as constable, took possession of said personal property without the consent of plaintiff, upon the request of Conde L. Benoist, and sold or detained the same from plaintiff, then your verdict must be for the plaintiff, against the said defendants, for the value of the personal property so taken at the time it was taken by said constable Miles, and you may if you see fit add interest thereon at six per cent per annum from the time of seizure by the constable, and if you do not so find the facts, your verdict must be for the defendant."

1. In respect to the exclusion of the evidence, which defendant offered as tending to prove usury, it does not appear that plaintiff proposed to loan Warrendorf $235 on condition that he would take up the Fishback note and give his own note for $300, but it does appear that the proposition was made to plaintiff that if he would loan Warrendorf $235, Warrendorf would take up the Fishback note and give his own for $300. Plaintiff did not exact or demand that Warrendorf should take up the Fishback note; that proposition came from the borrower and not from the lender, and it was immaterial whether the Fishback note was solvent or insolvent and we think the court correctly excluded the evidence as to the solvency of the note.

2. It is contended by defendant that as the chattel mortgage does not on its face purport to be the deed of Warrendorf that, as to creditors prior and subsequent, the deed is not his deed. It is undoubtedly the law that a chattel mortgage executed by the owner of the property under a fictitious name is not notice to a bona fide purchaser of the property from the owner selling under his true name. Mackey v. Cole, 79 Wis. 426. And it is undoubtedly true that had defendant bought the property without notice of the fact that Warrendorf was doing business under the name "Echo Publishing Company" and that the chattel mortgage was his act and deed he would be entitled to hold the

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property against the mortgagee. But the evidence is that the premises occupied by Warrendorf as a publishing house were rented from defendant, and that defendant knew he was doing business under the name "Echo Publishing Company."

It is also in evidence that before the sale was made plaintiff notified defendant in writing that Warrendorf had made the mortgage. In these circumstances there can be no doubt that defendant bought with knowledge of the fact that Warrendorf had mortgaged the property to plaintiff. He was, therefore, not an innocent purchaser, but a purchaser with full notice of the fact of the existence of the mortgage and of the fact that it had been executed by Warrendorf. His purchase, therefore, was subject to the mortgage and his retention of the property after his purchase was a conversion of it on account of which he was liable to plaintiff for its value.

The instruction asked by defendant and refused by the court was on the theory that the mortgage was given to secure a usurious loan and that the mortgage having been executed by Warrendorf under an assumed name was not binding on the defendant. This instruction, as we have seen, was rightfully refused as was also the instruction in the nature of a demurrer to the evidence.

Discovering no reversible error in the record, the judgment is affirmed. *Barclay* and *Goode, JJ.*, concur.

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STATE OF MISSOURI ex rel. JOSEPH W. FOLK, Circuit Attorney of the Eighth Judicial Circuit, Respondent, v. MISSOURI EXPLORATION AND LAND COMPANY, Appellant.

St. Louis Court of Appeals, December 9, 1902.

1. **Corporations:** REPORTS: FAILURE OF CORPORATION TO FILE REPORT. The duty of instituting proceedings to recover the fines and penalties provided for if corporations do not make the reports to the Secretary of State as required by sections 1013 and 1017, Revised Statutes 1899, rests on the prosecuting attorney of the county where the company is located, or, if in the city of St. Louis, on the circuit attorney, and the proceedings should be in the name of the State at the relation of the county, or of said city.

2. **Defect of Parties:** PRACTICE, TRIAL: PLEADINGS: WAIVER. Defect of parties is waived by not objecting to said defect either by demurrer or answer.

3. **Statute of Limitations.** The limitation of the time within which a suit may be brought for failure of a corporation to report to the Secretary of State is fixed at six months from the first day of September of the year in which the report is due, and the right of action accrues on that day.

4. **Pleading:** PETITION, SUFFICIENCY OF. Under Revised Statutes 1899, section 1015, providing that no corporation required by statute to furnish reports to the Secretary of State shall be excused by reason of its failure to receive blanks required to be supplied by the Secretary of State, a petition in an action to recover the penalty provided by section 1017, Revised Statutes 1899, for failure to make such report, need not allege that blanks had been mailed to the corporation therefor.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

AFFIRMED.

Edward D'Arcy for appellant.

(1) Penal statutes are to be strictly construed. "When a penal statute is sought to be enforced, a case

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must be made out within its terms," and a failure to do so is fatal. State to use v. Railroad, 19 Mo. App. 104; Connell v. Tel. Co., 108 Mo. 459; State v. Bryant, 90 Mo. 534; State v. Reid, 125 Mo. 43; State v. McLain, 49 Mo. App. 398; Wood v. Tel. Co., 59 Mo. App. 240; McGrew v. Railroad, 114 Mo. 216. (2) An action for a penalty due the State can not, in the absence of express authority therefor, be maintained in the name of an officer. The suit must be brought in the name of the State, or in that of the person designated by statute. Hunter v. Field, 20 Ohio 340; Colburn v. Swett, 1 Metc. (Mass.) 232; Inhabitants v. Trundy, 12 Me. 204; Brownell v. Railroad, 164 Mass. 29; Irish v. Webster, 5 Me. 171; Hedges v. Dam., 72 Cal. 523.

Jos. W. Folk and *Nelson Thomas* for respondent.

(1) A defendant can not complain of defect of parties plaintiff in an action, unless the point has been raised either by demurrer or by answer. "The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, . . . no jurisdiction; or, second, no legal capacity to sue; third, another cause of action pending; fourth, that there is a defect of parties plaintiff or defendant." Sec. 598, R. S. 1899. "When any of the matters enumerated in section 598 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action." Sec. 602. (2) Objection to the party plaintiff in this suit should have been raised by demurrer, and not having been raised either by answer or demurrer, could not have been considered on motion for new trial and arrest of judgment. State ex rel. v. Sappington, 68 Mo. 454; Hammons v. Binford, 84 Mo. 345; Northeastern L. &

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T. Co. v. Brown, 59 Mo. App. 461; Burdsall v. Davies, 58 Mo. 138; State ex rel. Johnson v. True, 20 Mo. App. 177; Walker v. Deaver, 79 Mo. 664; Railroad v. Anthony, 73 Mo. 431.

GOODE, J.—This is an action to recover a penalty under section 1017, Revised Statutes 1899, for failure of the defendant to make report to the Secretary of State for the year 1901 as provided in section 1013 of the statutes. The petition is as follows:

"State of Missouri, City of St. Louis, ss.

"In the Circuit Court, City of St. Louis, February Term, 1902.

"The State of Missouri ex rel. Joseph W. Folk, Circuit Attorney of the Eighth Judicial Circuit, Plaintiff,

v.

Missouri Exploration and Land Company (a corporation), Defendant.

"Plaintiff states that on the first day of June, A. D. 1901, and from that date up to the present time, defendant was and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and plaintiff states that at the times mentioned defendant was and now is a corporation whose stock is divided into shares, and that it was not and is not a railroad, building and loan, or insurance company, nor a corporation exempted from taxation by the laws of this State.

"Plaintiff complains of defendant herein, and for cause of action states that defendant failed to report to the Secretary of State of the State of Missouri, on the first day of July, A. D. 1901, or within sixty days thereafter, the location of its principal business office, the name of its president and secretary, the amount of its capital stock, both subscribed and paid up, the par value of its stock, and the actual value of its stock at the time of making said report, the cash value of all its personal property and of all its real estate within this State on the first day of June immediately preceding, and the amount of taxes, city, county and State, paid

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by said defendant in this State for the year last preceding the report.

"Wherefore, the plaintiff prays for judgment against defendant in the sum of one thousand dollars and costs.

"JOSEPH W. FOLK,
"Circuit Attorney of the Eighth Judicial Circuit."

The judgment, omitting caption, is as follows:

"Now at this day, this cause being called for hearing, plaintiff appears by attorney but defendant comes not and plaintiff submits the cause to the court upon the pleadings, proof and evidence adduced, and the court having heard and considered the same and being fully advised finds for plaintiff and assesses plaintiff's damages at the sum of $50. It is therefore considered by the court that plaintiff do recover of defendant the damages aforesaid as assessed, to-wit: Said sum of fifty dollars and also costs of suit and have execution therefor."

Within four days after judgment, the defendant, who neither answered nor theretofore appeared, filed motions for a new trial and in arrest, and these being overruled appealed and prays a reversal on two grounds:

First, because the action was brought in the name of the State at the relation of Joseph W. Folk, circuit attorney of the Eighth Judicial Circuit, instead of at the relation of the city of St. Louis.

Second, because the petition contains no allegation that the Secretary of State had rendered a report to said circuit attorney of the defendant's delinquency, or that the action was brought to the first term of the court after the circuit attorney had received such report, or that the Secretary of State furnished defendant with blanks.

1. The duty of instituting proceedings to recover the fines and penalties provided for, if corporations do not make the report to the Secretary of State required by the statutes, rests on the prosecuting attorney of the county where the company is located, or, if in the city

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of St. Louis, on the circuit attorney, and the proceedings should doubtless be in the name of the State at the relation of the county, or of said city.

This action is in the name of the State of Missouri, the proper plaintiff, and to that extent was well brought, the defect of parties consisting in the relator named; but this visible mistake was waived by not objecting to it either by demurrer or answer. R. S. 1899, secs. 598 and 682; State ex rel. v. Sappington, 68 Mo. 454; State ex rel. v. True, 20 Mo. App. (K. C.) 176.

This rule is not altered because the action is on a penal statute. 16 Ency. Plead. and Pr. 235; Railway v. State, 55 Ark. 200. If the error had been brought to the attention of the trial court it could have been cured by substituting the proper relator, and the code discourages legal ambuscades by precluding a party who lies low until after judgment from then annulling the judgment for some fault of procedure which he could easily have pointed out before.

2. The limitation of the time within which a suit may be brought for failure of a corporation to report to the Secretary of State is fixed at six months from the first day of September of the year in which the report is due, and the right of action accrues on that date.

The petition in the present case, instead of showing the action was barred, shows it was begun in time and so there can be no defense on the score of limitation.

The cause of action accrues to the State on the first day of September after the report falls due and not on the notification of the prosecuting officer by the Secretary of State of a company's default, because that notification is to be made after the first of September. The notification, therefore, is intended to apprise prosecuting officers of what companies are delinquent within their cognizance, and is in no sense a provision for the benefit of defaulting corporations. Indeed, the whole scope of the statutes on the subject shows that while various directions are given to enforce compliance with the requirements of corporation reports, the essence of the case for the statutory penalty is that a corporation

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is delinquent and to make out a defense, it must show some excuse for its delinquency.

The Secretary of State is directed to send blanks to every company before the fifteenth day of June of each year for them to make their reports on, but it is provided that the failure of the Secretary of State to furnish blanks shall be no excuse for the failure of a corporation to make a report (R. S. 1899, secs. 1012 and 1015).

There is no merit, therefore, in the contention that the petition should have alleged blanks were mailed to appellant.

The judgment is affirmed. *Bland, P. J.*, and *Barclay, J.*, concur.

WILLIAM W. JONES, Respondent, v. D. G. SILVER, Appellant.

St. Louis Court of Appeals, December 9, 1902.

1. **Res Adjudicata:** PARTIES. What is meant by identity of parties to the former suit to be effective as a bar in a later suit, is not that all of the plaintiffs or all of the defendants to the former suit must be parties plaintiff or defendant in the later suit, but that some or all of the identical parties plaintiff and some or all of the identical parties defendant are made parties plaintiff and defendant in the later suit.

2. ———: ———: JUSTICE'S COURT: CIRCUIT COURT: PRACTICE, TRIAL. Where the same questions were directly involved in a suit before a justice of the peace (and no appeal was taken from the judgment of the justice of the peace) and a suit in the circuit court, defendant is precluded from proving the defense he set up in his answer in the circuit court, by the judgment of the justice.

3. **Fraud:** LAW: EQUITY: PRACTICE, TRIAL. Fraud is cognizable at law as well as in equity, and when a defendant without objection submits his case to a jury who tried it on the law side of the court, he can not be heard to complain that he tried it on a wrong theory.

4. **Practice, Trial:** LAW: EQUITY: JUSTICES' COURTS: JURISDICTION. And it is not competent by a mere motion before a justice of the peace to change the nature of an action from a legal to an equitable one so as to oust the jurisdiction of the justice.

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Appeal from St. Louis City Circuit Court.—*Hon. John A. Talty,* Judge.

AFFIRMED.

J. F. & R. H. Merryman for appellant.

(1) The court erred in holding, on the authority of Edgell v. Sigerson, 26 Mo. 583, and Hickerson v. City of Mexico, 58 Mo. 61, that the proceedings in the justice court, in which defendant F. M. Call, the guarantor, was a party defendant and made the defense and paid the judgment, was *res adjudicata* as to defendant Silver. The court erred because: (a) No identity of parties. (b) The defense of the defendant Silver in this court was an equitable one—strictly an equitable proceeding. He could not have interposed it before the justice for the reason that the justice had not jurisdiction. (c) Under the proof there was an additional defense in this court to the defense alleged to have been interposed in the justice court. (2) The defense of defendant Silver is an equitable one. He prays for the cancellation of the contract, and in his answer in the two suits in the circuit court he interposes a counterclaim praying for the return of the money paid under the contract. In the proceeding at bar, while he dismissed his counterclaim he still prayed for a cancellation of the contract on the ground of fraud and tenders the stock received from plaintiff. (3) In section 3837, Revised Statutes 1899, it is provided that "No justice of the peace shall have jurisdiction to hear or try any action against any executor or administrator, nor of any action of slander, libel, malicious prosecution or false imprisonment, nor of any action where the title to any lands or tenements shall come in question and be in issue, nor of any strictly equitable proceedings. (4) In 70 Mo. App. 74, it was said: "It is needless to say that it is well established in this State, both by statute and the adjudicated cases, that a justice of the peace has no authority to exercise equitable jurisdiction. R. S. 1899, sec. 6124; Phillips v. Burrows, 64 Mo. App. 351;

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Iron Co. v. McDonald, 61 Mo. App. 559; Enlow v. Newland, 22 Mo. App. 581; Willis v. Stephens, 24 Mo. App. 494; Hicks v. Martin, 25 Mo. App. 359.

Bishop & Cobbs for respondent.

(1) In the case of Edgell v. Sigerson, 26 Mo. 584, the first suit was brought by Edgell and Peasley, while the second suit was brought by Edgell alone. The Supreme Court says: "The integrity of the note was necessarily and directly in issue in the suit brought to recover the annual installment of interest, and the judgment in that case having been rendered by a court of competent jurisdiction, determined the question as to the alteration of the note, and was conclusive between the same parties in another suit directly involving the same question." (2) In the case of State ex rel. v. Branch, 134 Mo. 604, the Supreme Court in following the case of Edgell v. Sigerson, supra, says: "In a suit for an installment of interest on a promissory note the defendant pleaded an alteration of the note which avoided it. This issue was found against him. In a subsequent suit on the note itself the question as to the alteration was held to be *res adjudicata.*"

BLAND, P. J.—Omitting caption the petition is as follows:

"Plaintiff, for his cause of action, states that on the twentieth day of June, A. D., 1900, the defendants executed under their hands and seals, as did also the plaintiff, an agreement of that date, which said agreement was in words and figures as follows, to-wit:

" 'This agreement made this day between William W. Jones, party of the first part, and D. G. Silver, party of the second part, with F. M. Call, guaranteeing the said agreement for said Silver, witnesseth:

" 'That said William W. Jones has this day sold and transferred to said D. G. Silver the one hundred and six shares of stock which he has held in the Marshall Lumber Company, a corporation, for the price and

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sum of three thousand three hundred and sixty dollars to be paid in staves and headings manufactured by the said Marshall Lumber Company, and to be delivered in twelve months, that is to say, to be delivered monthly in equal installments of the same, the keg material at the price as per contract now existing between the Marshall Lumber Company and J. Warren Jones, and the barrel material at the market price in St. Louis at the time of the delivery of the same.

" 'And the said D. G. Silver hereby agrees that he will pay said William W. Jones for said shares of stock in said corporation the above mentioned sum, in the staves and headings of said factory, as specified above, to be delivered in twelve equal monthly installments, as contracted for above.

" 'And the said F. M. Call hereby agrees, as part of the consideration of the sale of said shares to said Silver, that he will and hereby does guarantee the payment of said sum by said Silver, in the manner mentioned above in the time specified above.

" 'In witness whereof, we have hereunto set our hands and seals and to a duplicate hereof, this twentieth day of June, 1900.

" 'Wm. W. Jones, (seal).
" 'D. G. Silver, (seal).
" 'F. M. Call, (seal).'

"That the plaintiff transferred and delivered to the said D. G. Silver the said one hundred and six shares of stock in said contract described, and that he has duly performed all the conditions of said contract by him to be performed; that the defendant D. G. Silver has made deliveries and payments on account of said contract as follows, to-wit: August 24, 1900, one carload of said material described in said contract of the value of $256.95; August 27, 1900, one carload of said material of the value of $333.11; and November 3, 1900, one carload of said material, of the value of $240.49; making a total of $830.55 on account of the first three monthly installments provided by the said contract; that defendant D. G. Silver has failed and refused to make

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any other or further deliveries or payments under said contract and still fails and refuses to make the same, of which said failure the defendant F. M. Call has had notice; that there is now due and unpaid on account of said contract three installments or payments, amounting in all to the sum of $849.45 with interest at the rate of six per cent per annum on each installment thereof from the date on which it became due and payable.

"Wherefore plaintiff says that by reason of the breach of said contract as aforesaid and the failure of the defendants to make said three payments as above stated, he has been damaged in the sum of $849.45 together with interest, for which sum plaintiff prays judgment against defendants and for costs."

Defendant Call demurred to the petition on the ground that there was a defect of parties defendant. The demurrer was sustained and the suit was proceeded with against D. G. Silver alone.

Defendant filed the following answer (omitting caption):

"Now comes the defendant, D. G. Silver, and for amended answer to plaintiff's petition admits that he signed the agreement on the twentieth day of June, 1900, as set out in plaintiff's petition, and that plaintiff transferred and delivered to him the 106 shares of stock of the Marshall Lumber Company as stated in said petition, and that he made the payments set out in said petition but defendant denies each and every other allegation therein contained.

"Defendant for a further answer and defense to plaintiff's petition states that in the summer of 1899 plaintiff was the owner of certain machinery and a plant and was engaged in manufacturing staves at Equality, Illinois, and that he was the promotor of a certain enterprise which in the early part of 1900 was organized as a corporation known as the Marshall Lumber Company; the capital stock of which said company was $20,000 divided into 200 shares of $100 each. That the plaintiff induced F. M. Call and George W. Marshall and two or three other parties who became small stockholders to

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join him in this enterprise. That Marshall and Call paid up their shares of stock in full, but plaintiff subscribed for 100 shares of stock and organized the company, purporting to have paid one-half of said 100 shares of stock. Defendant states that of the 106 shares of stock assigned by plaintiff to him on the twentieth day of June, A. D. 1900, as stated in plaintiff's petition, 100 shares of which was the stock which plaintiff purported to have half paid up at the time of the organization of said corporation; but defendant avers that said stock was never half paid by said plaintiff; that it represented old and worthless machinery brought by the plaintiff from his old plant at Equality, Illinois, and that said machinery, instead of representing a value of $5,000 as required by the laws of the State of Missouri, was not of the value of $1,000, and that said machinery at the time of the failure of said corporation on the fourteenth day of November, 1900, was only appraised for less than $1,000, and defendant further avers that plaintiff induced defendant without any consideration whatever and in entire ignorance that said 100 shares of stock were not half paid up, as plaintiff represented them to be, to purchase 100 shares of stock of the Marshall Lumber Company as stated aforesaid, to be paid for by him as stated in the agreement; and defendant avers that no consideration passed from plaintiff to defendant, and that said agreement stated in plaintiff's petition is fraudulent and void; defendant further avers that plaintiff, as a further inducement and for the purpose of getting defendant to purchase 106 shares of stock, represented to defendant that the machinery which the plaintiff had put into said plant was of the value of $7,500 and for which he only received stock of the value of $5,000 and that the indebtedness of the Marshall Lumber Company amounted to only $5,000, and that the plant was making money from $100 to $125 per day, all of which statements plaintiff knew to be false; and defendant, relying on these statements, purchased said stock and signed the agreement set out in plaintiff's petition; and that he would not have pur-

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chased the stock and signed said agreement if plaintiff had not led him to believe said representations were true; defendant avers that the indebtedness of the Marshall Lumber Company on the day he purchased said stock and signed said agreement amounted to nearly $9,000; and that within twenty-four hours after the signing of the agreement the various creditors levied attachments on the assets of said corporation, which defendant was compelled to have released in order to operate said plant; that said machinery was old and worn out, and was not of the value of $1,000 and required daily patching and repairing, and that said Marshall Lumber Company never made in all its existence in any one day the sum of $100; that it had lost money and accumulated debts from the date of its incorporation; and that defendant charges that there never was a day during its entire existence when its debts did not exceed its paid-up capital stock and its assets.

"Defendant charges that the representations made by the plaintiff as aforesaid were false and fraudulent, and that said statements were known to be false by plaintiff, and he therefore prays the court that said contract be adjudged to be void and of no effect, and that the same be ordered to be delivered up to him to be cancelled, and for such other and further relief as to the court may seem meet and proper."

To the answer the plaintiff filed the following reply:

"Comes now the plaintiff in the above entitled cause and for his amended reply to defendant's amended answer denies each and every allegation of new matter therein contained.

"For a further reply, plaintiff states that on, to-wit, the eleventh day of February, 1901, this plaintiff filed suit against this defendant and one F. M. Call, who also signed the agreement set out in the petition, before the Hon. R. B. Houghton, a justice of the peace in and for the fourth district of the city of St. Louis, to recover from them the sum of $280 as the amount then due on account of the seventh installment to be made and de-

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livered under the contract set out in the petition herein; that by a change of venue the said defendants took the said case before the Hon. William Jefferson Pollard, another justice of the peace in and for the said fourth district of the city of St. Louis; that the said justice had full and complete jurisdiction of all of the parties, and of the subject-matter in said case; that on, to-wit, the eighth day of April, 1901, the said case was tried before the said last-named justice of the peace and a jury called for that purpose by the said defendants and the defendants in said trial introduced evidence tending to prove and did try to prove each of the following defenses to said cause of action, to-wit:

"First. That neither of said defendants was indebted to the plaintiff on account of the seventh installment to be made and delivered under said contract or on account of any other installments therein mentioned.

"Second. That all of said contract was null and void and of no effect.

"Third. That the consideration for the said contract had both partially and wholly failed.

"Fourth. That the stock transferred by the plaintiff to the defendant Silver under said contract was worthless and was known by the plaintiff to be worthless at the time of the signing of the said contract.

"Fifth. That the defendants were induced by the plaintiff to sign said contract by the following representations, which the said defendants alleged and endeavored to prove were false and made fraudulent for the purpose of inducing the said defendants to sign said contract, to-wit, that of the 106 shares of stock transferred by the plaintiff to the defendant Silver 100 shares had been originally subscribed for by the plaintiff and had been one-half paid up by him; that in payment of said shares of stock the plaintiff had transferred to the Marshall Lumber Company, machinery of the value of $7,500 for which the plaintiff had received stock of the value of only $5,000; that the indebtedness of the Marshall Lumber Company amounted to only $5,000, and that the plant of the Marshall Lumber Company

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was making money at the rate of $100 to $125 per day, all of which said allegations are now set up by defendant as defenses in this action. This plaintiff further says that although defendant urged each of the above-named defenses and each and every defense set out in said answer in said trial before said justice of the peace and said jury, and produced evidence tending to prove each of said defenses and each defense set out in said answer, yet after a full and complete hearing of all the evidence adduced by plaintiff and defendant on the merits of said cause of action and the said defenses, the said jury returned a verdict in favor of this plaintiff for the full amount of his claim for the said seventh installment under said contract, to-wit, the sum of $280; that a judgment was duly entered by said justice of the peace upon said verdict; that on, to-wit, the twenty-second day of April 1901, the defendants paid and satisfied said judgment in full, and this plaintiff now alleges that said judgment is an adjudication of the validity of said contract and the liability of the defendant to perform the same in accordance with the terms thereof, and that said judgment is a bar to the said defenses now set up in defendant's answer herein, and plaintiff so pleads said judgment as a bar to said defenses so set out in said answer."

Defendant moved for judgment on the pleadings on the ground that the law presumed all remedies had been exhausted against the principals from the fact that a judgment had been obtained against the guarantor and that the judgment rendered by the justice against Call, guarantor, was *res adjudicata* as to other proceedings against Silver, the principal. The motion was overruled and the parties proceeded to trial. At the close of the evidence the jury, on a peremptory instruction given by the court, rendered a verdict for plaintiff for the amount sued for with legal interest. After unavailing motions for new trial and in arrest of judgment defendant appealed.

The evidence is that plaintiff sued defendant and Call before a justice of the peace for the installment due

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under the contract for the month of February, 1901, and that the defendants appeared in person and by their attorneys and made the same defense as the one set forth in the answer. Defendant offered to show that he had some depositions before the justice, tending to prove his defense set up in that court, that were excluded by the justice and offered to read the same depositions on the trial. This offer was denied by the court and this ruling is assigned as error. The court refused to hear any evidence offered by the defendant tending to prove any of the allegations of his answer for the reason the judgment, before the justice of the peace, rendered in a cause between the same parties upon the same contract as the one sued on and where the same defense was made as that set up in the answer, is *res adjudicata.*

The only question presented for decision is whether or not the judgment rendered by the justice precluded the defendant from making the same defense in the circuit court that he made in the justice's court, it being conceded that the issues, except as to the installments and the amount due, are the same. Defendant contends that as Call was not a party to the suit in the circuit court, but was a party in the justice's court, that there is not an identity of parties defendant and for this reason defendant was not barred from making his defense in the circuit court. No appeal was taken from the judgment of the justice and it has been paid by Call. What is meant by identity of parties to the former suit, to be effective as a bar in a later suit, is not that all of the plaintiffs or all of the defendants to the former suit must be parties plaintiff or defendant in the later suit, but that some or all of the identical parties plaintiff and some or all of the identical parties defendant are made parties plaintiff and defendant in the later suit. Nave v. Adams, 107 Mo. 414; The Mo. Pac. Ry. Co. v. Levy, 17 Mo. App. (K. C.) 501; Wager v. Insurance Co., 150 U. S. 99.

The evidence is all one way that defendant made the same defense in the justice's court that he set up in

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his answer in the circuit court. His purpose in the justice's court was the same as in the circuit court, to-wit, to prove that he had been induced to sign the contract by false and fraudulent representations made to him by plaintiff. The same questions were directly involved in both suits and there is no question that defendant was precluded from proving the defense he set up in his answer in the circuit court by the judgment of the justice. Edgell v. Sigerson, 26 Mo. 583; Young v. Byrd, 124 Mo. l. c. 593; Donnell v. Wright, 147 Mo. 639; Wiggin v. St. Louis, 135 Mo. 558; Garland v. Smith, 164 Mo. 1; Short v. Taylor, 137 Mo. 517.

Defendant's motion for judgment on the pleadings was rightfully overruled for the reason the debt or installment sued for in the circuit court was not the same debt or installment for which judgment was rendered in the justice's court.

An attempt, by motion, was made by defendant to have the justice transfer the case to recover the February, 1901, installment to the circuit court, on the ground that the defense set up was an equitable defense; and it is contended here that the answer in this case converted the case to an equitable one. There was no written answer filed in the justice's court. The defense was verbally stated in that court. The answer filed in the circuit court concludes with a prayer for equitable relief and sets up a legal defense to the petition, to-wit, a plea that the contract is void because it was procured by false and fraudulent representations. Fraud is cognizable at law as well as in equity, and the defendant without objection submitted his case to a jury who tried it to the law side of the court. Having taken this course in the trial court he can not be heard to complain that he tried it on a wrong theory, nor was it competent by a mere motion before a justice of the peace to change the nature of the action from a legal to an equitable one so as to oust the jurisdiction of the justice.

The judgment is affirmed. *Barclay* and *Goode*, *JJ.*, concur.

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FERDINAND M. J. WALLRATH et al., Respondents, v. WILLIAM L. BOHNENKAMP, et al., Appellants.

St. Louis Court of Appeals, December 9, 1902.

1. **Trustees:** VIOLATIONS OF INSTRUCTIONS: DAMAGES. A petition set forth a contract between plaintiffs, as makers of a deed of trust, and defendant, as trustee, whereby defendant agreed to see that the money secured by the deed was applied to the payment of bills for labor and material, and to the contracts for certain buildings on the land covered by the deed, in such a manner as to protect plaintiffs' rights under their contract with the contractor; and that by reason of the failure of defendant to exercise "the care and diligence which he had promised," and by reason of his "negligence and carelessness" in paying the money to the contractor while material and labor liens which the contractor was bound to meet were unsatisfied, plaintiffs sustained damages, etc. *Held,* that the petition counted on the contract, and not on the negligence of defendant as separate from his contract obligation.

2. **Trustees:** EVIDENCE: CONTRACT. Evidence in an action between the maker of a deed of trust and the trustee examined, and *held,* sufficient to support a finding of a contract between them, whereby the trustee was to hold the money obtained under the deed, and expend it so as to protect the grantor's rights under a contract, which he had with the contractor who was building houses on the land covered by the deed.

3. ———: DEED OF TRUST: CONTRACT: VERDICT: PRACTICE, APPELLATE. Where in an action between the maker of a deed of trust and the trustee, who retained the money, the evidence (all verbal) is sufficient to justify an inference that the money has not all been applied as called for by the contract between the parties, the Court of Appeals will not disturb a verdict necessarily so finding.

4. ———: ———: ———. A trustee in a trust deed agreed with the maker that he would hold the money, and pay it out for labor and materials for certain houses being built on the property covered by the deed, and not pay the contractor for the houses while there were any outstanding bills for labor and material. The trustee did pay the contractor while there were such outstanding bills, and the contractor, an insolvent, failed to apply the money to the payment of the bills. *Held,* that the grantors in the deed could recover against the trustee for any such bills they were compelled to pay by reason of such failure of the contractor to pay them out of the sum advanced to him by the trustee.

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5. ———: ———: ———. The trustee also agreed not to pay the contractor until the work was completed, but did so. *Held,* that the grantors could also recover against the trustee for any money they were obliged to expend in the completion of the houses, so far as such expenditures were occasioned by a misappropriation by the contractor of the payment to him by the trustee.

6. **Grantor:** CONTRACTOR: AGREEMENT. The grantors and the contractor afterwards settled on an agreed sum which the contractor should pay them for the meeting of such bills. *Held,* that the grantors' recovery against the trustee was limited to such sum.

7. **Error:** INSTRUCTION: PRACTICE, TRIAL. It is not error to refuse an instruction covered in one given by the court of its own motion.

8. **Jury:** INSTRUCTION: MEASURE OF DAMAGES. After a jury had been fully instructed as to the basis of recovery and measure of damages, if any, and had retired, they asked for further instructions as to what items of damages were claimed by plaintiff, whereupon the court gave them an itemized statement of plaintiffs' claims. *Held,* that such action did not vary the previous instructions, and was proper as a mere recapitulation of the plaintiffs' testimony as to the damages.

Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferris,* Judge.

AFFIRMED.

William Hilkerbaumer for appellants.

(1) The jury should have been instructed as requested by defendant in his refused instruction, that the default of contractor Lemke in the performance of the building contract was entirely consistent with defendant's non-ability, for without such instruction the cause was not fairly submitted, and the jury was left to consider, and from the verdict apparently did consider, that the measure of defendant's liability was the amount of the indebtedness of the contractor to plaintiffs arising out of a default of the building contract. One of the offices of instructions is to define the issues and to exclude from the jury questions foreign to the case. Newell

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v. St. L. Bolt and Iron Co., 5 Mo. App. 253. The refusal of the court to give this instruction, or the omission to include a similar one in its own, was prejudicial to defendant. Wyatt v. Railway, 62 Mo. 408. (2) The instruction, given at the request of plaintiffs, is faulty, in that it authorizes the jury to construe a written contract, the execution or terms of which were nowise in dispute. It is also faulty in permitting the jury to consider parol evidence in connection with a written contract, and to vary the same. Miller v. Dunlap, 22 Mo. App. 97; Spalding v. Taylor, 1 Mo. App. 34.

Henry H. Oberschelp for respondents.

(1) The opinion of witness Eidman was properly excluded. He was not qualified as an expert, and this was not a proper subject of expert testimony. Turner v. Haar, 114 Mo. 335. (2) Exception must be made at the time the objectionable ruling is made. R. S. 1899, sec. 727; Bray v. Kremp, 113 Mo. 552. (3) Defendant waived his demurrer to plaintiff's evidence by introducing evidence on his own behalf. McPherson v. Railroad, 97 Mo. 253; Ins. Co. v. Crandall, 120 U. S. 527. (4) There was abundant evidence from which the jury could infer that the damage plaintiff sustained was the result of defendant's breach of contract. Turner v. Haar, 114 Mo. 335. (5) Where the evidence was sufficient to support the verdict, and it received the approval of the trial court, the appellate court will not interfere on the theory that it is based upon passion or prejudice. State v. McGinnis, 158 Mo. 107; State ex rel. v. Gage Bros. & Co., 52 Mo. App. 464.

GOODE, J.—Plaintiffs employed Paul J. Lemke, a building contractor, to erect two frame cottages on a lot of theirs in the city of St. Louis, Lemke agreeing to furnish all the material and labor required to complete the cottages, for which he was to be paid nineteen hundred and fifty dollars in installments as he progressed with the work. Plaintiffs not having all the

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money needed to defray the expense of the houses applied to the defendant Bohnenkamp for a loan of twelve hundred dollars and he procured the money from Gustave and Louisa Morelock, the Wallraths executing a deed of trust on the houses and lot to secure the debt, in which deed Bohnenkamp was trustee. Another loan of three hundred dollars was afterwards advanced by the same parties and secured in the same way. Bohnenkamp retained the money lent on both occasions to see that it was applied to pay for the construction of the cottages and refused to pay it to the Wallraths. According to his own testimony he paid all the first loan but about twenty dollars, and seventy-two dollars of the second one, to Lemke the contractor, paying the balance to laborers and materialmen. Lemke failed to pay for all the labor and material that went into the houses and plaintiffs were compelled to satisfy certain lienable demands on account of his default, and as Lemke was insolvent, they instituted this action against Bohnenkamp for reimbursement of what they paid out above the contract price, on the ground that Bohnenkamp improperly disbursed said loan money retained by him and thereby cause plaintiffs' loss.

The building contract between the plaintiffs and Lemke, which there was testimony to show the defendant saw when the first loan was made, bound Lemke to pay all debts incurred to mechanics or materialmen and allowed plaintiffs to keep back enough of the contract price to discharge whatever obligations of that character he might leave unpaid. In the deeds of trust written by the defendant was a covenant on the part of plaintiffs that the premises were free from mechanics' liens and that the filing of a lien against them should give the beneficiaries the right to foreclose.

The petition, after reciting the above facts, is based on an alleged contract entered into between plaintiffs and defendant, which is set forth as follows:

"That both of said deeds of trust were executed and delivered by plaintiffs with the understanding and agreement between plaintiffs and said Bohnenkamp that

the loans evidenced by said deeds of trusts were made on condition that said Bohnenkamp, for the protection of these plaintiffs as well as the holder of the deeds of trust, was to see to the proper application of the funds raised upon said deeds of trust toward the payment of the balance due for said buildings, so that no mechanics' liens should be filed against said property; that, for this purpose said Bohnenkamp was to handle and disburse said funds himself, instead of turning them over to plaintiffs, to the extent to which they might be needed to pay the balance due and to become due for said buildings; that these conditions were accepted by plaintiffs as a part of the terms of said loans and that said Bohnenkamp in consideration of the commission he was to receive from plaintiffs, undertook and agreed with plaintiffs, as a part of the services to be rendered by him in connection with said loans, to handle the said funds in such manner as duly and fully to protect plaintiffs in the matter of their rights and duties under said building contract and the covenants and stipulations in said deed of trust, to the end especially, among other things, that all claims for work and labor and materials furnished in, to, and upon said buildings should be fully paid, so that no mechanics' liens or other claims might be filed or might remain unpaid in connection with the erection of said buildings under said contract, and that the contractor Lemke, should not be fully paid until all the provisions of said building contract have been fully performed and the buildings completed according to said contract; and to that end and purpose said Bohnenkamp furthermore promised and agreed to and with plaintiffs to exercise such care and diligence as might be necessary to fully protect these plaintiffs against all loss and damage in the premises."

The petition then states the above-mentioned provisions of the building contract and avers: "All of which said Bohnenkamp knew and agreed with plaintiffs to protect them fully with reference to said provisions and to see that all said labor and material bills

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were paid before paying said sums in his custody and possession to said contractor, Lemke, and furthermore promised these plaintiffs not to pay said last installment of $350 to said contractor until said buildings and improvements were completed in full, in accordance with said building contract."

The petition further states that by reason of the failure on the part of defendant Bohnenkamp to use and exercise the care and diligence in the premises which he had promised plaintiffs to use and exercise, and by reason of the negligence and carelessness of Bohnenkamp in paying out the said money, etc., plaintiffs sustained damage.

The answer, after admitting the execution of the building contract between plaintiffs and Lemke, and the deeds of trust, denied all the other allegations of the petition. It also sets up as defenses that Bohnenkamp acted as the agent of the Morelocks, and that plaintiffs and Lemke for the sum of $174, to be paid by the latter, settled their dispute.

The testimony of the plaintiffs was that when the first loan was made, defendant refused to turn over any money to them, saying he would have to see it was applied to pay for the houses; that they might build a house on some other lot than the one described in the deed of trust, if he gave them the money, but that he would see that all bills were paid; to leave it to him and he would see that everything went right; that it was paid out all right, and similar expressions. About the same talk took place when the second money was borrowed.

Bohnenkamp denies that he made any agreement with the plaintiffs about the first money, but swears the lender, Morelock, told him to see that it was paid out for labor and material furnished for the buildings. He also testified concerning what he said to Wallrath as follows:

"I told him the situation and explained it to him; I said if I would pay him the money now he might take the money and build a house on some other lot. I told

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him for the protection of the parties interested I would have to see that the buildings were erected out of this money, that the money was applied to the erection of these buildings. I told him if it was my money that I might entrust it to him, but under the circumstances I could not do that since it was not my money, it was Mr. Morelock's and I would have to see after his interest and see that the money was expended for the erection of these buildings."

And on cross-examination he swore he undertook to see that the fifteen hundred dollars went into the buildings.

The instructions given and refused are too lengthy to be set out, but will be stated in substance as far as we think necessary in the opinion.

The jury returned a verdict for the plaintiffs for $331.47.

1. The petition counts on a positive agreement of the defendant to pay out the loan money which he retained so as to fully protect the plaintiffs and to prevent a misapplication of any part of the funds by the contractor. It is true there are averments that the defendant acted carelessly in the matter in failing to use the diligence he had promised the plaintiffs to use; but the degree of diligence he promised is stated in another paragraph of the petition to be such as might be necessary to fully protect the plaintiffs against loss and damages on account of lienable debts due for labor and materials; which is equivalent to averring defendant agreed to see that the funds were properly applied, and that is the meaning of the petition, considered as a whole. We, therefore, overrule the assignment of error based on the assumption that the petition counts on the negligence of the defendant and not on a contract, as well as the kindred one relating to the refusal of an instruction requested by the defendant on the theory that he was only liable for negligence.

2. Instead of there being no testimony to prove the contract alleged in the petition, the record abounds in pertinent evidence. In fact the defendant practically

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admits the contract, as will be seen by reference to his own testimony set out in the statement, and the attempt to torture an admission that there was no contract out of the testimony of Wallrath is disingenious. Wallrath spoke English poorly and when he said he could get no agreement out of Bohnenkamp, the clear meaning of his expression was that he could not get Bohnenkamp to pay him any of the money although he (Wallrath) was demanding it; that Bohnenkamp kept it all, promising to see it was properly used in paying for the houses, to which arrangement Wallrath was forced to accede.

3. It is strenuously insisted the evidence conclusively shows the entire fifteen hundred dollars went to discharge the cost of the houses and that the sums plaintiffs were compelled to pay lien claimants accrued because the cost exceeded the contract price. The evidence does establish to our satisfaction that Bohnenkamp himself paid all the money retained either for material or to contractor Lemke; but does not so clearly establish that Lemke disbursed all of what he received for labor and materials, and he received the full amount borrowed except about three hundred dollars.

But this court is not to judge of these facts if the testimony warrants different inferences. It was all verbal and we hold it was for the jury to weigh it and having weighed it to draw conclusions about whether all the money plaintiffs borrowed went for legitimate payments. Gannon v. Gaslight Co., 145 Mo. 502; Kingsbury v. Joseph, 94 Mo. App. (St. L.) 298. In the light of the instructions the jury must have found the entire sum was not so applied and must have found also, that the defendant agreed with plaintiffs that it should be; for those were the facts to be found before they were authorized to return a verdict for the plaintiffs.

4. Practically every ruling made by the court during the trial is attacked and we can not undertake to review all the assignments of error seriatim, but will

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notice only such as we think important enough to merit comment.

The court told the jury that if they found the defendant agreed with the plaintiffs he would not pay over the money in his hands to the contractor until all bills for labor and material were paid and would protect the interest of plaintiffs in this matter, and further found defendant paid over the money to Lemke while bills for labor and material were unpaid, and that the money so paid to the contractor or any part thereof was not used by him to pay for labor and materials and that thereafter plaintiffs were compelled to discharge unpaid bills to avoid liens, then the defendant was liable to the extent Lemke failed to apply the money received by him from the defendant to the payment of bills for labor and materials, unless they found, as the defendant claimed, that Lemke and the plaintiffs had adjusted their loss at one hundred and seventy-four dollars, in which case defendant's liability could not extend beyond that sum. They were further instructed that if they found Lemke applied all the money he received from Bohnenkamp to the payment of fair and reasonable bills contracted in building the houses, plaintiffs could not recover anything from defendant.

Those charges were fair and accurate.

One item of damages asserted by the plaintiffs was for the cost of completing the houses, which are said to have been left unfinished by Lemke. As to that item, the jury were instructed that if Lemke received money from Bohnenkamp which was never applied in payment of the houses, and further found defendant had agreed not to pay Lemke until the work was completed, and that the sum received by Lemke which he did not apply to the houses exceeded what plaintiffs had been compelled to pay out in order to avoid liens, the defendant was liable to plaintiffs for the cost of finishing the houses in so far as the money received by Lemke from defendant exceeded the sums paid by plaintiffs to avert liens.

As there was ample testimony to show Lemke left the houses unfinished and plaintiffs were forced to

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finish them at their own expense, the above charge was a proper one; because plaintiffs were entitled to recover the whole amount they were out either in paying Lemke's bills or to finish his contract, provided their recovery did not exceed what Lemke had misused of the money paid to him by defendant.

An instruction requested by the defendant telling the jury if the entire amount of money borrowed was used in the construction of the dwellings and paid to persons furnishing materials for and performing work thereon the verdict must be for the defendant, although the evidence showed Lemke was in debt to the plaintiffs on account of his default in the performance of his contract, was fairly covered by an instruction given on the court's motion; hence, it was no error to refuse the duplicate.

After the jury had retired to consider of their verdict, they returned and asked further instruction concerning the item on which plaintiffs claimed to recover, and thereupon the court instructed them as follows:

"The plaintiffs claim:

1. A plumbing bill for .... $ 36.40.
2. Lumber bill for .... 52.89.
3. Planing Mill bill for .... 241.43.
4. Cost of base-boards ....
5. Cost of window fasteners."

Giving that instruction is assigned as error, but it was in exact accord with plaintiff's demand and could only go to the enlightenment of the jury. One objection urged to it is that it permitted plaintiffs to recover for an extra bill paid by them for gas-fittings, which was not required to be done by the contract between plaintiffs and Lemke. As we read the testimony, Wallrath swore there was some extra gas-fitting work ordered which he paid for, but contended the plumber's bill for gas-fitting stated in the petition was part of the work which Lemke agreed to do. It is further said the instruction conflicts with the instruction on the measure of damages theretofore given, which limited the amount

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of plaintiff's recovery to the amount misapplied by the contractor, whereas the last one authorized the jury to allow any item mentioned in it regardless of Lemke's misuse of the money paid him by the defendant. The instruction given on the return of the jury simply told them what items the plaintiffs claimed and asked to recover and did not direct the jury to allow those items, nor in any way alter the previous instructions as to what facts they must find before they could return any verdict for the plaintiffs, or as to how they should estimate the damages to be awarded in case they did find a verdict for them. The inference the record warrants is that the jury were unable to remember certainly what items plaintiffs testified they had paid on account of Lemke's default and the court simply recapitulated those items, which was entirely proper.

We do not accede to the contention that the verdict was so manifestly against the evidence as to show prejudice and passion on the part of the jury. If it was against the weight of the evidence that was a matter to be corrected by the trial judge, who must have thought it was not, as he refused to grant a new trial. Defendant himself testified that when he paid the contractor the twelve hundred dollars he knew of only nine hundred dollars in bills that had been settled by him and knew further that certain other bills were then outstanding and unpaid. He said, also, that when he paid the balance of the three hundred dollars to Lemke, he (defendant) expected Lemke to take it and pay it to the planing mill where a bill was owing, but Lemke failed to do so.

Defendant's own testimony tended to warrant a verdict in plaintiff's favor and finding no error in the manner in which the case was tried, we affirm the judgment. *Bland, P. J.*, concurs: *Barclay, J.*, not sitting.

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NORA KENNEDY, Respondent, v. F. H. PORTMAN and J. G. WOEMPNER, Appellants.

St. Louis Court of Appeals, December 9, 1902.

1. **Warehouseman:** CONTRACT. In the case at bar, if the contract was to store the goods in one locality, and without the consent of plaintiff they were stored elsewhere and damaged or destroyed as a result of the failure of the defendants to perform their contract of bailment as it was made, a case for damages arose.
2. **Bailment:** BAILEE: LIABILITY: ACTION: DAMAGE. When a bailee is entrusted with goods for a particular purpose or to keep iu a particular place, he is responsible for loss caused by using them for a different purpose or keeping them in a different place.
3. **Jury:** INSTRUCTION: CONTRACT: EVIDENCE: PRACTICE, TRIAL. In the case at bar, it should have been referred to the jury to say on the entire evidence whether there was an actual agreement or meeting of the minds of the parties in respect to where the goods were to be stored, or a misunderstanding between them as to that matter.
4. **Damages:** EVIDENCE: REMITTITUR: NEW TRIAL. Where, in an action to recover of a warehouseman for goods partly destroyed and partly injured by fire, there was no evidence as to the value of the goods destroyed, and the evidence was conflicting as to the damages to those injured, there is no basis on which to fix the amount which should be remitted from a verdict which largely exceeds any evidence as to the amount of damage to the injured property, and a new trial should be had.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz,* Judge.

REVERSED.

Geo. W. Lubke, Jr. for appellant.

(1) The copy or duplicate of the warehouse receipt offered in evidence was competent evidence because the destruction of the original having been proved it was the best secondary evidence of the contents of the original. Briggs v. Henderson, 49 Mo. 531; Conn

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v. McCollough, 14 Mo. App. 584; Winfrey v. Gallatin, 72 Mo. App. 191. (2) Defendants' instruction that plaintiff could not recover, asked at the close of the evidence, should have been given, because the evidence fails to disclose a contract between the parties that the furniture in question should be stored at 2801 Cass avenue. There was no meeting of their minds or mutual assent on that proposition. Eads v. Carondelet, 42 Mo. 117; Brown v. Rice, 29 Mo. 322; Jones v. Williams, 139 Mo. 1; Mfg. Co. v. Broderick, 12 Mo. App. 578. (3) The first instruction given for the plaintiff is erroneous, because unsupported by the evidence. There was no evidence of the value of the part of plaintiff's goods destroyed by the fire. Gorham v. Railroad, 113 Mo. 408; Harrison v. White, 56 Mo. App. 175; Moore v. Hawk, 57 Mo. App. 495; McAtee v. Vanlandingham, 75 Mo. App. 45.

Albert C. Davis for respondent.

GOODE, J.—Nora Kennedy the plaintiff, through the agency of her daughter, Loretta, made a contract with the defendants in June, 1900, for the storage of certain household furniture, plaintiff being at the time in the city of New York.

This is an action to recover damages on account of the property being partly destroyed and partly injured by a fire while in storage, and the gravamen of the petition is that the defendants deviated from the contract of bailment by storing the property in a building at the rear of No. 1519 North Jefferson avenue, constructed of inflammable material and surrounded by frame stables instead of in a substantial brick building on the northwest corner of Twenty-eighth street and Cass avenue, designated as No. 2801 Cass avenue, in which building it is charged, the defendants had agreed to store the property. The petition gives 2800 as the number, but the evidence tends to prove a contract to store at 2801, on the opposite side of the street, and it may be that the

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number in the petition is a mistake; at all events, no point is made about it.

Defendants had been in the warehouse business for about fifteen years and their warehouse and place of storage was located in the rear of Elliot avenue, Nos. 1514 to 1526; and that was the building in which plaintiff's goods were stored. Defendants never had a warehouse at either 2800 or 2801 Cass avenue, but did have an office in the latter building and sold furniture there. Their warehouse was a two-story brick building and so far as the testimony shows was according to the representations in regard to it except as to its location.

If the contract was to store the goods in one locality, and without the consent of the plaintiff they were stored elsewhere and damaged or destroyed as a result of the failure of the defendants to perform their contract of bailment as it was made, a case for damages arose; because when a bailee is entrusted with goods for a particular purpose or to keep in a particular place he is responsible for loss caused by using them for a different purpose or keeping them in a different place. Lilley v. Doubleday, L. R. 7 Q. B. 510.

Loretta Kennedy, who made the contract with Woempner, one of the defendants, and Emma Hayden, who testified that she was present when the contract was made, furnished all the evidence tending to prove it was a part of the contract that the property should be stored at No. 2801 Cass avenue, and although their testimony to establish that fact strikes our minds as of feeble probative force, we have concluded it was sufficient to go to the jury. They swore substantially that in the course of negotiations in regard to the contract of storage, Loretta Kennedy inquired of Woempner what the number of his warehouse was, as she wanted to take out insurance on the property, and he said, No. 2801 Cass avenue.

While we think there was evidence to go to the jury as to whether there was a contract to store at No. 2801 Cass avenue, as contended by the plaintiff, we must condemn an instruction given by the court as an

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unjustifiable comment on the evidence of Loretta Kennedy. Said instruction is as follows:

"The court instructs the jury that if they believe and find from the evidence that on or about the 29th day of June, A. D. 1900, the plaintiff's daughter, L. M. Kennedy, representing plaintiff, had a conversation with the defendants, or either of them, about the storage of the plaintiff's goods by the defendants, and that the price for storing the same was agreed upon, and the defendants, or either of them, agreed to store said goods, and if the jury finds that in said conversation the defendants, or either of them, said that they would store the plaintiff's goods at 2801 Cass avenue, at the northwest corner of Twenty-eighth and Cass avenue, or that their warehouse was at 2801 Cass avenue on the northwest corner of Twenty-eighth and Cass avenue, then the court instructs you that there was a contract between plaintiff and the defendants to store said goods at 2801 Cass avenue, on the northwest corner of Twenty-eighth and Cass avenue."

That instruction follows the allegations of the petition rather than the evidence, in some of its expressions, because there was no evidence that Woempner said anything about the northwest corner of Twenty-eighth street and Cass avenue and the use of that language over-emphasized the effect of the testimony for the plaintiff. Nor was it proper to tell the jury that a statement of one of the defendants, in the course of a conversation, that his warehouse was No. 2801 Cass avenue, constituted a contract between plaintiff and defendants to store at that number. The case should have been referred to the jury to say on the entire evidence whether there was an actual agreement or meeting of the minds of the parties in respect to where the goods were to be stored, or a misunderstanding between them as to that matter.

The court gave an instruction as to the measure of damages which permitted the jury to award damages for the property totally destroyed as well as that which was injured, although there was no proof as to the value

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of the destroyed property, and but slight proof of the amount of damage done to what was partially burned, but perhaps sufficient as to the latter item for the jury to weigh it.

In order to correct the error in submitting the question of damages sustained by the loss of the totally destroyed property when there was no evidence on the subject, the court ordered that the defendants' motion for new trial be sustained unless the plaintiff would remit all of the verdict but $217.35; the amount of the verdict being $460.

Repeated perusals of the testimony have failed to show any evidence by which the court could have arrived at what the jury found was the damage done to the partially burned property. Maybe by taking the testimony of the only witness who swore as to the amount of damage on behalf of the plaintiff, a conclusion might be reached; but the difficulty is, there was contradictory evidence as to the damage done on the part of the defendants, and it is impossible to say with certainty what weight the jury allowed to this contradictory testimony.

The error in the instruction on the measure of damages was one which, in the state of the evidence, a remittitur could not cure. The judgment must be reversed and the cause remanded. *Bland, P. J.*, and *Barclay, J.* concur.

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THE LACLEDE POWER COMPANY OF ST. LOUIS, Appellant, v. ROBERT T. STILLWELL, Assignee of the ZENAS VARNEY CARRIAGE COMPANY, Respondent.

St. Louis Court of Appeals, December 9, 1902.

1. **Contract, Construction of: RULE.** A contract should be so construed in full scope and purpose as not to give an unfair advantage to either party to the contract.
2. ———: ———: ———: ASSIGNMENT FOR BENEFIT OF CREDITORS. In the case at bar, the defendant by making an assignment and dispossessing itself of all its assets rendered itself unable to comply with the contract and thereby committed a breach of it.
3. ———: ———: ———: UNLIQUIDATED DAMAGES: ASSIGNED ESTATE: PRACTICE AND PLEADING. Unliquidated damages, for breach of contract made by an assignor to a deed of voluntary assignment for the benefit of creditors, may be proved up against the assigned estate.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer*, Judge.

REVERSED AND REMANDED.

C. R. Skinker for appellant.

(1) By the terms of the contract of August 19, 1898, the carriage company is obliged to take power from plaintiff until August 19, 1903. Springfield Seed Co. v. Walt, 67 S. W. 938; Missouri Edison Co. v. Bry, 88 Mo. App. 135; Missouri Edison Co. v. Steinberg Co., 68 S. W. 383. (2) The obligation of the clause of the contract binding the carriage company to take power from plaintiff for five years is absolute, and also independent of the clause binding the carriage company to take its "entire requirements for power supply" from plaintiff. The latter is a covenant enlarging the obligation of defendant, not lessening it. Upon well-

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settled principles of construction the contract in this case should be construed so as to bind the carriage company to take power from plaintiff for five years from its date. Haarstick v. Shields, 11 Mo. App. 602; McManus v. Shoe Co., 60 Mo. App. 218; Lieweke v. Jordan, 59 Mo. App. 624; Beach on Contracts, sections 708, 717, 718, and cases cited; Chitty on Contracts (4 Am. Ed.), 67. (3) The carriage company impliedly bound itself not to disable itself from performing the contract for the whole term of five years, by a voluntary assignment and withdrawal from business. St. Louis, etc. Co. v. Tierney, 5 Col. 582.

Louis A. Steber for respondent.

(1) The appellant's claim for power to be furnished in future is not sustainable out of the trust estate. Weinman & Co.'s Estate, 164 Pa. St. 405; 3 Am. and Eng. Ency. of Law (2 Ed.), pp. 138, 139, and notes. (2) Unliquidated damages are not provable against an assigned estate. In re Adams, 67 How. Pr. (N. Y.) 284.

BLAND, P. J.—On August 19, 1898, the Zenas Varney Carriage Company, a corporation, made the following contract with the appellant corporation, to-wit:

"St. Louis, Mo., Aug. 19, 1898.

"To the Laclede Power Co. of St. Louis,
Room 808 Bank of Commerce Building:

"You are hereby ordered to connect your underground electric power service to building No. 2017 Morgan street, ready for connection to inside wiring, for which we agree to pay you a service charge of $——; and it is agreed to take from you a capacity of seven and one-half electric horsepower. Should a greater power capacity be taken from your lines at any time, an additional price will be paid therefor as hereinafter provided.

"It is agreed to take from you our entire require-

ments for power supply for the term or terms of five years and under the conditions hereinafter specified.

"Regular bills will be rendered on the first day of each month and are payable at the company's office on or before the fifth day of same month. Bills remaining unpaid after the fifth inst., are subject to an addition of five per cent, and in the event all bills due the company from the applicant or applicants hereto are not paid by the fifteenth inst., the supply of power may be shut off by the company until the bills are paid, without thereby vitiating this contract.

"Authorized agents of the company shall have access to the premises at all reasonable times for the purpose of examining motors, meters and wires, or for the purpose of disconnecting the wires for non-payment of bills when due, or for the removal of its property.

"This contract shall be in force from and after date, and shall continue for periods of five years until either party shall at the expiration of any period of five years give written notice of its desire to discontinue this arrangement. The electric current furnished is to be used for power purposes only, and is to be charged for at said company's prevailing rates.

"This contract does not contemplate the supply of power for lighting, and the power supplied under this contract shall not be used for such purposes without the written consent of the company.

"Minimum charges per month under this contract are at the rate of two dollars net per horsepower, and are based upon the maximum power capacity required or used at any time, but in no case shall the total payments during each year of the period or periods of this contract be less than $180, excepting that a proportionate allowance shall be made for such time as may elapse between date hereof and the date of first service connection to building or tender of service connection.

"Meters are to be furnished at the option of the consumer or the company, in which case a deposit will be made by the undersigned with the company to cover their cost.

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"If at any time the Laclede Power Company shall be compelled, by act of God, by governmental authority, national, state or municipal, or by other cause, to discontinue, in whole or in part, the operation of its lines for the supply of power, then it shall not be liable for any failure to supply power thereby incurred; but in all cases the said company shall use its best efforts to resume the operation of its lines.

"Rate $15 net per month to cover use of power to operate freight elevator not more than fifty-two hours per month.

"J. VARNEY CARRIAGE CO.,
"FRED DOPP, Prest.

"Accepted for the Laclede Power Company of St. Louis.

"By WILLIAM FAY."

Pursuant to the contract, appellant furnished to the carriage company electric power in varying amounts until January 7, 1899, for which the carriage company made monthly payments. On January 27, 1899, the carriage company made a voluntary assignment of its effects to respondent, R. T. Stillwell, for the benefit of its creditors. Stillwell qualified and took possession of the assets of the assignor.

After the assignment the carriage company failed to take or pay for any of the electric power of appellant.

On April 15, 1899, the appellant presented to the assignee a claim for $795 damages on account of the alleged breach by the carriage company on its contract with appellant for electric power and asked that it be allowed against the estate. The assignee rejected the claim and appellant appealed to the circuit court where, on a hearing anew, the appellant was forced to take a nonsuit. A motion to set aside the nonsuit and for new trial proving of no avail, the cause was appealed to this court.

The petition for the allowance of the claim presented to the assignee alleged, as a breach of the con-

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tract, that appellant "had at all times been, and now is, ready, willing and able to continue to furnish power to the carriage company; that the assignee has refused to take the power according to the terms of the contract and that the carriage company is insolvent and has transferred its property to the assignee for the benefit of creditors."

The questions presented for solution by the record are, first, whether the carriage company bound itself to take the power during the life of the contract, or was it only bound to take the power when and at such times during the contract period as it might require; second, if the carriage company was bound to take the power during the entire period of five years, are the damages due to the breach of the contract by the carriage company making its assignment for the benefit of its creditors, provable against the assigned estate? On the strength of the following paragraph of the contract, to-wit: "It is agreed to take from you our entire requirements for power supply for the term or terms of years and under the conditions hereinafter specified," it is contended by respondent, and was so ruled by the circuit court, that the carriage company was at liberty to take or refuse to take electric power from appellant at any time, provided it did not take electric power or other power from some other concern. If this paragraph stood alone and did not refer to other conditions of the contract, and if it was in no way controlled by other provisions of the contract, and if the situation of the parties was such as to lend countenance to a literal interpretation of it, then we think the contract might fairly be construed to bind the carriage company to take the power at such time as it might require and that it was at liberty at any time during the life of the contract to discontinue the taking of the power if it did not require the use of it. But the further conditions to which the paragraph is made subject are such as to refute the argument that the carriage company was only bound to take power when and as it required.

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The further conditions of the contract, and to which reference is made and to which the paragraph is subject, provide that the contract shall continue for periods of five years until either party shall, at the expiration of any period of five years, give written notice of its desire to discontinue the arrangement.

It is also provided that in no case shall the total payment during each year of the period or periods of the contract be less than $180, and provides also a rate of $15 net per month to cover use of power to operate a freight elevator, to be paid on or before the fifth day of each month. According to these provisions the carriage company was bound to pay, on or before the fifth day of each succeeding month, $15 for power agreed to be used in the preceding month, whether it required it to operate its freight elevator or not, and was bound to pay for each year during the life of the contract a sum not less than $180 for the use of appellant's power whether it used the power or not. These provisions are wholly inconsistent with the idea that the carriage company was at liberty to discontinue payment for the use of the power, if for any reason it did not require the use of it in the operation of its freight elevator. That the parties had in contemplation the probability that the carriage company would in the future require power for other purposes than the operation of its elevator, is evident from the tenor and effect of the contract when considered as a whole. To provide for this probable requirement the appellant agreed to furnish such power at two dollars net per month per horse power, and the carriage company agreed to take such power at said rate whenever it should require it, and it is this additional power to which the paragraph quoted has reference and it was this prospective requirement of additional power the parties had in mind that gave birth to that clause.

The consideration which moved the appellant to connect its underground electric service with the premises of the carriage company was, that for five years at least the carriage company would take of it

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sufficient power to operate its freight elevator and pay therefor $15 per month, and that if the carriage company should, at any time during the life of the contract, require additional power for other purposes, it would take it of appellant and pay therefor at the rate of two dollars per month per horsepower. To give any other construction to the contract would be to lose sight of its full scope and purpose and give an unfair advantage to the carriage company. The latter should not be done if there is room to give it some other construction fair to both companies. McManus v. Shoe & Clothing Co., 60 Mo. App. (St. L.) 216; Missouri-Edison Co. v. Steinberg Hat & Fur Co., 94 Mo. App. 543; St. Louis, etc., v. Tierney, 5 Colo. 582; Beach on Contracts, sec. 708. By making the assignment and dispossessing itself of all its assets, the carriage company rendered itself unable to comply with the contract and thereby committed a breach of it. Moore v. Thompson, 93 Mo. App. (St. L.) 336; Hoyle v. Scudder, 32 Mo. App. (St. L.) 372;: In re Reading Iron Works, 150 Pa. St. 369; Potts v. Rose Valley Mills, 167 Pa. St. 310; Kalkhoff v. Nelson, 60 Minn. 284; Lovell v. St. Louis Mut. Ins. Co., 111 U. S. 272.

The claim as presented was not for monthly payments for electric power, as respondent's counsel seems to have assumed in his argument and brief, but for damages for a breach of the contract. Can such damages be proven up against the assigned estate? Following Hoyle v. Scudder, supra, in Moore v. Thompson, supra, we held that unliquidated damages, for a breach of a contract made by an assignor to a deed of voluntary assignment for the benefit of creditors, might be proved up against the assigned estate. This view is supported by the Reading Iron Works' case, Potts v. Rose Valley Mills, Kalkhoff v. Nelson, and Lovell v. St. Louis Mut. Ins. Co., supra, and we are not persuaded that the Hoyle and Moore cases should be departed from. There was a clear breach of the contract by the carriage company and appellant is entitled to recover substantial damages if he can prove

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them; if not, he is entitled to at least nominal damages. Dulaney v. The St. Louis Sug. Ref. Co., 42 Mo. App. (St. L.) 659; Weber v. Squier, 51 Mo. App. (St. L.) 601; Brevard v. Wimberly, 89 Mo. App. (St. L.) 331.

The judgment is reversed and the cause remanded. *Goode, J.*, concurs; *Barclay, J.*, not sitting.

FREDERICK W. MOTT et al., Appellants, v. TAYLOR BERNARD, Administrator of JAMES N. MACKIE, Deceased, et al., Respondents. 97 265 / 97 *692

St. Louis Court of Appeals, December 9, 1902.

1. **Attorney's Fee:** CONTINGENT FEE: CONTRACT: WITNESS: ASSIGNEE: CAUSE OF ACTION. The fact that an attorney's fee is contingent upon the successful termination of contemplated litigation does not disqualify him as a witness to prove that a contract was made by which the cause of action to be litigated was assigned to the plaintiff by another party, since deceased.

2. **Judgment:** INJUNCTION: PRACTICE, TRIAL. A judgment will not be enjoined for a flaw in procedure which produces no substantial injury to the party against whom the judgment went.

3. ——: ——: ——: PLEADING AND PRACTICE: EQUITY: BILL IN EQUITY. In this case the plaintiffs seek to enjoin a judgment against them, recovered by defendant, on the ground that the cause of action had been assigned by the defendant before he sued on it; but the petition contains no allegations, nor is there any proof that the plaintiffs were prevented from interposing any defense they had to the other action by the fact that it was prosecuted in defendant's name; nor was it shown that any unjust or oppressive consequence resulted from its being prosecuted in defendant's name instead of in the name of the party to whom he had assigned it: *Held*, that there is no equity either in the petition or in the proof, and the bill was properly dismissed.

Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood,* Judge.

AFFIRMED.

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J. L. Hornsby for appellants.

(1) The testimony of witnesses Taylor and Grant as to the alleged contract or agreement under which the suit in question was instituted by Mackie, is incompetent; these witnesses are parties to the contract or agreement jointly with Mackie, now dead, and both are interested in the result of the litigation. R. S. 1899, sec. 4652; Tierman v. Meier, 90 Mo. 433; Bank v. Hunt, 25 Mo. App. 170; Rice v. McFarland, 41 Mo. App. 489; Biebers v. Boeckman, 70 Mo. App. 506. (2) Mackie having, on July 12, 1898, transferred by written assignment his alleged claim against Mott and Sauer to Dr. Grant, had no right or title to this claim at the time he instituted the suit against Mott and Sauer, on December 31, 1898, and the fact that he was therefore not the real party in interest in said cause constituted a valid legal defense, which, if shown, would have defeated his suit. R. S. 1899, sec. 540; American Spelter Co. v. Ins. Co., 71 Mo. App. 658; Renfro v. Prior, 25 Mo. App. 402-406; Long v. Heinrichs, 46 Mo. 603.

Seneca N. & S. C. Taylor and *Charles Erd* for respondents.

(1) The doctrine is settled that a judgment at law will not be enjoined unless its execution would be against equity and good conscience. George v. Tutt, 36 Mo. 141; Davis v. Staples, 45 Mo. 567; Sauer v. City of Kansas, 69 Mo. 48; Wilhite v. Ferry, 66 Mo. App. 433; Herwick v. Barber Supply Co., 61 Mo. 456; Bank v. Gilpen, 105 Mo. 22; Smith v. Sims, 77 Mo. 273. (2) Under the statute, the interest of a witness alone does not exclude him where the other party is dead. The statute is an enabling not a disabling act. Disqualification obtains only where the witness and the deceased are both parties to the contract or cause of action, and where the establishment of the contract opposes some interest of the estate of the deceased. Priest v. Chou-

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teau, 12 Mo. App. 252; Fink v. Hay, 42 Mo. App. 292; State ex rel. v. Flynn, 66 Mo. App. 373; Looker v. Davis, 47 Mo. 140; Coughlin v. Haeussler, 50 Mo. 126; Bates v. Forcht, 89 Mo. 127. (3) Even if it were true (but it is not proven in this case) that Mackie made an assignment of his entire claim, in the summer of 1898, to Grant, yet Grant turned the claim back orally and refused to accept it, thereby vesting in Mackie the right to sue upon the claim. Hansler v. Dawson, 28 Mo. App. 536; Van Court v. Nelson, 60 Mo. App. 523; Cable v. Dock Co., 12 Mo. 133; Heimenz v. Georger, 50 Mo. App. 586. (4) Under our liberal statute, amendments may be made by the substitution of one plaintiff for another where the nature of the claim is not changed. R. S. 1899, secs. 660-673; Wellman v. Dismukes, 42 Mo. 101; Thompson v. Mosely, 29 Mo. 479; Harkness v. Julian, 53 Mo. 242; State ex rel. v. Shelby, 75 Mo. 484.

GOODE, J.—James H. Mackie, deceased, began an action on December 31, 1898, in the circuit court of the city of St. Louis, against Frederick W. Mott and George H. Sauer for a balance he claimed was due him on a contract between him and Mott and Sauer for the construction of certain houses. Mackie died pending that action. The respondent Taylor Bernard was appointed administrator of his estate, and the cause was revived in said administrator's name and proceeded with to a judgment for about twenty- five hundred dollars, from which an appeal was taken to this court where the judgment was affirmed, provided the administrator would remit six hundred dollars, which he did; so that the judgment thereafter stood for a little more than eighteen hundred dollars.

Bernard, as administrator of Mackie's estate, then took out an execution from the office of the clerk of the circuit court to enforce the judgment and delivered the same to respondent Dickman, sheriff of the city of St. Louis, with an instruction to levy upon and seize the property of Mott and Sauer. This action was

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brought to restrain the levy of the execution and enjoin the collection of the judgment by the appellants, on the ground that Mackie had assigned his claim against them to John M. Grant prior to the institution of the action in which he recovered judgment and, therefore, had no right to sue in his own name; but that appellants were unable to make defense against Mackie's demand on the ground that he had transferred his cause of action, because they were ignorant of the assignment until after final judgment was obtained in the cause.

The petition avers the foregoing facts, which are substantially all it averred, there being no allegation that appellants had a defense as against Grant on the merits of the other case which was not interposed therein; nor is any showing made that appellants were prejudiced by the case being prosecuted in Mackie's name, further than arose from the bare circumstance that he was not, as was claimed, the real party in interest.

A temporary restraining order was granted, but on final judgment was dissolved and the bill dismissed. The written assignment itself from Mackie to Grant was not introduced, but in lieu thereof an unsigned paper said to be a copy of the original. In fact no proof of the assignment was made by the evidence in chief introduced in behalf of appellants except the statement of respondent Bernard, contained in an affidavit filed by him at the time the application for a temporary restraining order was made, of the following purport: "Affiant was informed by James H. Mackie in his lifetime, that the assignment mentioned in the affidavit of Mr. Garvin filed herein was executed only as a collateral security for the amount due by said Mackie to Dr. Grant, and said Mackie stated and claimed there would be received a sum exceeding the claim of Dr. Grant to the amount of about fifteen hundred dollars."

As well as we can gather from the record, the affidavit of one Garvin was filed when the restraining order was applied for, and to it was appended the unsigned paper referred to in Bernard's affidavit and asserted

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by the appellants to be a copy of Mackie's assignment to Grant.

Appellants objected to Bernard's stating, while on the witness stand, that Mackie told him he had assigned his claim to Grant, or stating anything Mackie said about the assignment, and on their objection he was refused permission to testify as to those matters. Grant himself was put on the stand by the respondent and on his cross-examination evidence was adduced that Mackie did execute a written assignment to him in 1898, substantially like the purported copy, but he swore it was made as collateral security and that when he found there would be litigation and liability for costs he refused to have anything to do with it, but turned it back to Mackie and told him to fight the case.

Seneca Taylor, the attorney who represented Mackie and Bernard in the original action against Mott and Sauer, testified he heard some kind of an assignment had been made by Mackie to Grant before he brought that action, but Grant refused to become responsible for the costs in any way, turned the claim back to Mackie, telling the latter to prosecute the claim and to bear all costs, and that if he recovered the money it should be turned over to Grant after deducting twenty-five per cent for attorney's fees, Grant's bill for medical services should then be paid out of it and the surplus returned to Mackie, it being expected the surplus would be large. Taylor swore: "I knew that was the arrangement between Dr. Grant and Mackie before I filed suit."

The competency of both Grant and Taylor as witnesses was objected to by the appellants, on the ground that they were interested parties and were disqualified, as Mackie, the other party to the contracts of assignment and re-assignment, was dead.

Taylor was not a party to the contract of re-assignment, nor is he a litigant, and the fact that his fee was contingent upon the successful termination of the contemplated litigation in no way disqualified him as a witness, as no one shall be disqualified, the statutes say,

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by his interest in the event of a suit. R. S. 1899, sec. 4652; Bates v. Frocht, 89 Mo. 121.

If Grant was incompetent as a witness and was wrongfully permitted to testify, as appellants assert, they never made good by proof their allegation that Mackie had assigned his claim to Grant before suit was instituted in the former's name; for the entire evidence offered in chief was wholly insufficient to show the terms of the contract of assignment, and they were only shown by Grant's testimony.

The evidence in this case leaves no doubt that the assignment of Mackie's claim against Mott and Sauer to Grant was merely for collateral security and that a re-assignment took place before the action to enforce the claim was instituted, which action, therefore, Mackie had a perfect right to maintain.

Neither was there any allegation of a defense held by Mott and Sauer against the original demand if it had been asserted in Grant's name, which they were prevented from interposing by the prosecution of the case in Mackie's name, nor any unjust or oppressive consequence shown. In fact, the bill and the proof are destitute of equity and disclose no ground for restraining the collection of the judgment. Enjoining a judgment is an act a court never does lightly or for a flaw in procedure not productive of substantial injury to the complainant. Davis v. Staples, 45 Mo. 567; Sauer v. Kansas City, 69 Mo. 46; Ritter v. Press Company, 68 Mo. 458.

The judgment of the court below dismissing the bill is affirmed. *Bland, P. J.*, and *Barclay, J.*, concur.

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CHAS. L. HORNSTEIN, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS et al., Appellant.

St. Louis Court of Appeals, December 16, 1902.

1. **Negligence:** INFERENCE FROM FACTS. In the case at bar, negligence is not to be inferred from the mere happening of the injury.

2. ——: MOTORMAN, DUTY OF. It is the duty of a motorman in charge of a street car to sound his gong on approaching a crossing, and the omission to do this is negligence.

3. ——: ——: WITNESS: EVIDENCE: NEGATIVE EVIDENCE. In the case at bar, defendants failed to produce the motorman as a witness, and the negative evidence of the failure of defendants to prove affirmatively that the gong was sounded at the railway crossing, if such was the fact, was sufficient proof of the allegation of negligence to send that issue to the jury.

4. ——: ——: DUTY OF PLAINTIFF. In the case at bar, it was plaintiff's duty to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track.

5. ——: CONTRIBUTORY NEGLIGENCE: PROXIMATE CAUSE. Where the negligence of plaintiff contributed to and was the proximate cause of his injury, no recovery can be had by him.

6. ——: ——: ——: INSTRUCTION: ERROR. In the case at bar, it was error for the trial court to refuse to give the following instruction to the jury. "If you believe from the evidence that the injury to the plaintiff was caused by the joint, mutual and concurring negligence of plaintiff and defendant's agents in charge of the car, and that the negligence of neither without the concurrence of the negligence of the other, would have caused said injury, then the plaintiff is not entitled to recover and your verdict must be for the defendant."

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer*, Judge.

Reversed and remanded.

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STATEMENT.

The suit is for the recovery of damages for personal injuries received by plaintiff on June 6, 1901, by being struck by one of the defendant's cars moving north on Vandeventer avenue in the city of St. Louis.

The allegations of negligence are:

"1. That the conductor of the south-bound car carelessly and negligently failed to give the plaintiff, as he was alighting from said car and about to cross the eastern track, any warning of the fact that the north-bound car was approaching.

"2. The said north-bound car was negligently permitted to run at a high and dangerous rate of speed as it approached and passed the corner of Page and Vandeventer avenues.

"3. That the motorman of said north-bound car negligently and carelessly failed to ring his gong or give any warning whatsoever of the approach of said north-bound car.

"4. That the motorman of said north-bound car negligently and carelessly failed to check the speed of his car, or to have said car under control, or keep a watch for persons approaching said eastern track."

The answer is, first, a general denial, second, the following plea of contributory negligence, to-wit:

"Further answering, the defendant says that, whatever injuries the plaintiff sustained, were caused by his own carelessness and negligence in stepping upon defendant's track in front of said approaching car, when by looking he might have seen, or by listening he might have heard the same, and avoided said accident."

The plea of contributory negligence was denied by a reply.

The evidence shows that Vandeventer avenue runs north and south and crosses Page avenue running east and west. In Vandeventer avenue are double railway tracks over which defendant operates street cars by electric power. Cars going south move on the west track and those going north on the east track.

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Plaintiff had resided in the immediate neighborhood of the crossing of Vandeventer over Page avenue for five or six months prior to his injury and had during all that time frequently traveled on defendant's cars on Vandeventer, and was familiar with the surroundings and knew as a fact that the cars going north and south passed each other frequently at the crossing of Vandeventer and Page avenues. He is a man of sixty years of age, but his hearing is unimpaired and his eyesight normal for a man of his age. If he is to be judged by his evidence his English is bad and his intelligence below the average. On the day of the accident the plaintiff took passage on defendant's car running south on Vandeventer intending to get off at Page avenue and go to his home on Page east of Vandeventer. When the car reached Page it stopped and plaintiff alighted. What then occurred is thus related by the plaintiff:

"When I got up from the car, I was looking around and listened for the second car on the second track, and I looked around and I listened for the car, and I could not see the car, and the bell did not ring. Then I looked back behind me and there the car started, and I walked over and I looked and listened for the bell, and I did not hear any bell or see any car, and when I got to the car and looked around I saw a car coming, and I turned back with my right shoulder, and the car struck me right on the right shoulder and knocked me down; and I did not know any more after that. That is all I know. I was knocked unconscious.

"Q. Can you state whether you had gotten in the east track? A. I walked over one track over to the other track.

"Q. I say, how far had you got when the car struck you? A. Only from the corner of my car—the end of my car; and then I saw the other car coming, because I was looking for the car and listening for the bell, and I did not see the car or hear the bell, and I was at the corner of my car, and when I saw the car coming, I

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turned back. I wanted to be safe, and I turned around. I fell on the other side of the track, in the west side.

"Q. Do you know anything about how the car was going? Whether fast or slow? A. No, sir; I did not see the car until I was at the end of the car. I was at the corner only, and I did not hear the bell ringing there. I was listening for those two points."

Plaintiff's evidence, and also that of some of the other witnesses, show that the car from which he alighted began to move south when plaintiff had reached the middle of the west track. Three witnesses, one on the east side of Vandeventer and two on the rear of the platform of the car from which plaintiff alighted, testified that they saw the other car coming from the north and that when they saw plaintiff going around the end of the car from which he alighted and going on east across the street they called to him to lookout a car was coming; that he either did not hear or paid no heed if he did hear. Plaintiff testified that he did not hear them.

One witness testified that the north-bound car was running at a rapid speed; that she judged of the speed by the noise it made. Others testified that it was running at the ordinary speed. There is no evidence of the actual or approximate speed at which it was running.

After the car struck plaintiff it was brought to a stop after running the width of Page avenue. There is no evidence that it was not under the control of the motorman.

The evidence is negative but tends to prove that the gong of the north-bound car was not sounded as it approached the crossing. There is no evidence that it was sounded.

At the close of the evidence for plaintiff, defendant moved the court to instruct the jury that plaintiff was not entitled to recover. This was denied and the cause was submitted to the jury on instructions given for plaintiff and defendant. The jury returned a verdict for plaintiff, assessing his damages at $1,000. A timely

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motion to set aside the verdict and for new trial was filed by the defendant which was overruled by the court and judgment was rendered on the verdict, from which plaintiff appealed.

Geo. W. Easley with *Boyle, Priest & Lehmann* for appellant.

(1) In the case at bar there is nothing in the record to show whether the motorman, on the car which struck plaintiff, saw him or not. To the same effect is a very recent case. Hanselman v. Railroad, 88 Mo. App. 122. It was said by this court that, where a boy nine years of age emerged suddenly from behind the car on which he had been riding and ran immediately into the flank of the nigh horse on the other track and was injured, there was no evidence of negligence on the part of the defendant. "The whole thing—the appearance of the boy, his collision with the horse, his falling down, and the passing of the wheels over him—was almost instantaneous." The cause was reversed without remanding. Dunn v. Railway, 21 Mo. App. 188. (2) The rule is definitely laid down in Maryland that where a person deliberately walks out from behind a street car from which he has alighted, and attempts to cross a public street without using his powers of observation, and is injured by an approaching car, which injury could have been avoided by the use of ordinary care, he can not recover damages for such injury. Baltimore Traction Co. v. Helms, 1 Am. Neg. Rep. 63. (3) When the injury is the result of the mutual fault of the parties, "the law will neither cast all of the consequences upon the defendant, nor will it attempt any apportionment thereof." Cooley on Torts (2 Ed.), p. 812, and cases collected in note 2. (4) "The negligence to defeat a recovery must be a proximate cause for the injury, but need not be the sole proximate cause." Payne v. Railroad, 129 Mo. 419. (5) The fourth and fifth instructions asked by defendant offered to submit to the jury the question of whose negligence

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caused the injury, and whether plaintiff's alleged negligence contributed thereto. They were certainly proper. Moher v. Railroad, 64 Mo. 276; 1 Thomp. on Neg., secs. 44, 45; Broom's Max., 216; Wharton's Neg., sec. 138; Hudson v. Railroad, 32 Mo. App. 676; Brown v. Railroad, 20 Mo. App. 227. (6) The plaintiff was in no danger until he got on or so near the track as to be struck. Even if the motorman saw him or should have seen him as he passed to the rear of the car from which he alighted, the motorman might properly assume that he would stop before getting so near the car as to be struck. Watson v. Railway, 133 Mo. 251; Yancey v. Railroad, 93 Mo. 433; Baker v. Railroad, 122 Mo. 595; Boyd v. Railroad, 105 Mo. 371; Smith v. Railroad, 52 Mo. App. 36.

Sale & Sale for respondent.

(1) The demurrer to the evidence was properly overruled. The plaintiff was not guilty of contributory negligence, as matter of law; in fact, there is no evidence in the record to support the allegation of contributory negligence charged by defendants, to-wit, that plaintiff stepped upon defendant's track. Railway v. Snell, 54 Ohio St. 197 (32 L. R. A. 276); Railway v. Gentry, Adm. (Ind.), 37 L. R. A. 378; Consolidated Traction Co. v. Scott (N. J.), 33 L. R. A. 122; Railway v. Robinson, 127 Ill. 9 (4 L. R. A. 126); Weber v. Railway, 100 Mo. 202; Smith v. Union Trunk Line, 18 Wash. 351 (45 L. R. A. 169); Schmidt v. Railroad, 149 Mo. 296; s. c. 163 Mo. 645.

BLAND, P. J.—Defendant insists that its demurrer to plaintiff's evidence should have been given. In the circumstances of the case negligence of defendant is not to be inferred from the mere happening of the injury. Murphy v. Wabash R'y Co., 115 Mo. 111; Yarnell v. The Kansas City F. S. & M. R'y Co., 113 Mo. 570; Harper v. Standard Oil Co., 78 Mo. App. (St. L.)

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338; Breen v. The St. Louis Cooperage Co., 50 Mo. App. (St. L.) 202.

There is no evidence in support of the first, second or fourth allegation of negligence in the petition. In respect to the third allegation of negligence, the failure to give the warning signal, it is unquestionably the law that the duty of the motorman in charge of the car running north was to have sounded the gong on approaching the crossing. The omission of this duty was negligence. Dixon v. The C. & A. R'y Co., 109 Mo. 413; Weller v. C., M. & St. P. R'y Co., 164 Mo. l. c. 195.

While there is no direct proof that the signal was not given, there is negative evidence of the fact, and it was within the power of the defendant to have proven affirmatively by the motorman in charge of the car, if it was a fact, that the warning was given. Defendant failed to produce the motorman as a witness or to account for his absence. The negative evidence of the failure to give the warning signal and the failure of defendant to prove affirmatively that it was sounded, if such was the fact, was sufficient proof of the third allegation of negligence to send that issue to the jury, and there was no error in refusing defendant's peremptory instruction, unless the evidence is all one way that plaintiff was guilty of such contributory negligence as to preclude his right of recovery, notwithstanding the defendant was guilty of negligence in failing to give the warning signal.

The plaintiff testified that he looked for the north-bound car as he was moving out of his car but he saw none; that he looked and listened when he got off, but that he neither saw nor heard the approaching car. He could not see on account of the obstruction caused by the car he had just left; looking, under the circumstances, was a useless performance. The car from which he had alighted, he testified, began to move away when he was in the middle of the west track. Had he then halted but for one moment, the car that was obstructing his vision would have moved away and he could have seen the north-bound car, but he did not

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take this precaution. He moved on towards the east track without halting or hesitating and arrived sufficiently near that track just in time to come in contact with the corner of the vestibule of the car. This was negligence of the most pronounced sort. It was plaintiff's duty, in the circumstances, to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track. Weller v. C., M. & St. P. R'y Co., 164 Mo. l. c. 198; Dlauhi v. St. L., I. M. & S. R'y Co., 139 Mo. 291; Kelsay v. The Mo. Pac. R'y Co., 129 Mo. 362; Childs v. Bank of Missouri, 17 Mo. 214; Easley v. The Mo. Pac. R'y Co., 113 Mo. 236; Culbertson v. Street R'y Co., 140 Mo. 35; Pinney v. M. K. & T. R'y Co., 71 Mo. App. (K. C.) 577; Lien v. C. M. & St. P. R'y Co., 79 Mo. App. (K. C.) 475. Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of his injury; where this is the case the law is well settled that no recovery can be had. Weber v. The K. C. Cable R'y Co., 100 Mo. 194; Hogan v. Citizens' R'y Co., 150 Mo. 36; Moore v. K. C., Ft. S. & M. R'y Co., 146 Mo. l. c. 580; Corcoran v. St. L., I. M. & S. R'y Co., 105 Mo. l. c. 405, and cases cited; Tesch v. Milwaukee Electric R. & R. L. Co., 53 L. R. A. 618.

My associates are of the opinion that the case was one for the jury on the question of plaintiff's contributory negligence, but that the court erred in refusing the following instruction asked by defendant, to-wit:

"If you believe from the evidence that the injury to the plaintiff was caused by the joint, mutual and concurring negligence of plaintiff and defendant's agents in charge of the car, and that the negligence of neither, without the concurrence of the negligence of the other,

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would have caused said injury, then the plaintiff is not entitled to recover, and your verdict must be for the defendant,'' for which the judgment should be reversed and the cause remanded.

The judgment is reversed and the cause is remanded by the concurrence of *Barclay* and *Goode, JJ.*; *Bland, P. J.*, thinks the case should be reversed without being remanded.

ON MOTION FOR REHEARING.

PER CURIAM.—It may be well in acting upon this motion to state that the majority of the court entertain the opinion that the testimony tended to prove negligence on the part of the defendant company in failing to give the appropriate signals of the approach of the north-bound car, if not in other particulars of the negligence alleged in the petition.

The majority of the court consider that some of the instructions refused might well have been given, especially the one heretofore quoted in the opinion of the court.

The majority of the court are further of the opinion that the question whether plaintiff was guilty of contributory negligence directly conducing to his injury was, on the facts disclosed at the last trial, a question of fact for the jury.

The motion for rehearing is overruled, in which order all the judges concur for the reasons already given in the main opinion and in this memorandum.

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JOSEPH E. WALSH, Appellant, v. THE ASSOCIATION OF MASTER PLUMBERS OF ST. LOUIS, MISSOURI et al., Respondents.

St. Louis Court of Appeals, December 16, 1902.

1. **Monopolies**: REGULATION OF PRICES: STATUTORY CONSTRUCTION: BOYCOTT. Under the direct provisions of Revised Statutes 1899, chapter 143, article 2, section 8978, an agreement between a plumbers' association and dealers and manufacturers, whereby the latter agree not to sell supplies to others than members of the association, and the former to boycott any dealer found selling to a non-member, entered into for the purpose of fixing prices and limiting the production of such articles, was unlawful.

2. ——: ——: PLEADING AND PRACTICE: REMEDY: STATUTORY CONSTRUCTION. Section 8978, Revised Statutes 1899, declares agreements to regulate prices or to control or limit trade, illegal, and section 8982, Revised Statutes 1899, to furnish an additional remedy for the control and restraint of pools, trusts and conspiracies in restraint of trade: *Held*, that any remedy existing before the enactment of the above was not taken away, nor abridged by section 8979, Revised Statutes 1899, which makes it the duty of the Attorney-General and the prosecuting attorneys under his direction, to institute proceedings to restrain such illegal agreements.

3. ——: ——: ——: INJUNCTION, WHEN IT WILL LIE: PRACTICE, TRIAL. Injunction will lie to dissolve an illegal agreement between a plumbers' association and dealers and manufacturers, whereby the latter agree not to sell to others than members of the association, and the former to boycott any dealer found selling to a non-member, and to restrain the enforcement of such agreement against a plumber who, by reason thereof, has been unable to purchase supplies with which to do his work.

Appeal from St. Louis City Circuit Court.—*Hon. Horatio D. Wood*, Judge.

REVERSED.

Cunningham & Maurer for appellant.

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(1) Our code of civil procedure provides that "Every action shall be prosecuted in the name of the real party in interest." Sec. 540, R. S. 1899. And the petition herein certainly shows that the plaintiff is the real party in interest. (2) Whatever defendants counsel may have to say about plaintiff's remedy at law, it is true that he can not have an adequate remedy at law and it is also true that "the prevention of vexatious litigation and multiplicity of suits constitute a favorite ground of equity jurisdiction." 44 Mo. App. 626; 51 Mo. 100; 54 Mo. 577; 112 Mo. 610; 130 Mo. 323. (3) Because the law imposes upon the Attorney-General a duty, this does not take from the injured citizen the right to ask for redress in the courts of justice. Section 10 of our Bill of Rights states: "The courts of justice shall be open to every person and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

Seneca N. & S. C. Taylor and *Charles Erd* for respondent other than Rumsey & Sikemeier Co.

(1) The amended petition fails to state facts sufficient to constitute a cause of action against the respondents, or any of them. The refusal of the corporations who are before this court as respondents to deal with appellant, was not the denial of any right belonging to him. Hunt v. Simonds, 19 Mo. 583; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; State ex rel. v. The Associated Press, 159 Mo. 410; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233; Cooley on Torts, 278; Tiedeman's Lims. Police Powers, sec. 92. (2) The mere fact that respondents united in such refusal would no more constitute a violation of any right of appellant, of which he could complain in a court of justice, than would the refusal of one to trade with him. Hunt v. Simonds, 19 Mo. 583; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233; Ins.

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Co. v. Board of Fire Underwriters, 67 Fed. Rep. 310; In re Greene, 52 Fed. Rep. 119; Snow v. Wheeler, 113 Mass. 179; Bowen v. Matheson, 96 Mass. 499; Ins. Co. v. State, 86 Tex. 250.

BLAND, P. J.—The following is the petition, omitting caption:

"Now, this day comes the plaintiff in the above entitled cause and, by leave of court first had and obtained, files this his amended bill.

"Plaintiff states that the said Association of Master Plumbers of St. Louis, Missouri, is composed of the following named persons, who are members thereof, to-wit:"

(The names of three hundred, or more, persons and firms, carrying on the trade of master plumbers in the city of St. Louis, are then set forth.)

"That the defendant, F. A. Brandt, is the president of said association, and that J. J. McNary is the assistant secretary, and Phillip Schmidt is the secretary of said association.

"Plaintiff states that the defendants, viz., L. M. Rumsey Mfg. Co., Rumsey-Sikemeier Co., Cahil-Swift Mfg. Co., the National Plumbing Supply Co., N. O. Nelson Mfg. Co., Western Brass Mfg. Co., and Crane & Co., are corporations organized under the laws of this State, and are engaged in the manufacture and sale of goods and materials known as plumbers' supplies, with offices and places of doing business in the city of St. Louis, Missouri.

"For cause of action plaintiff states that he is, and has been for a long time, engaged in the business of plumbing in the city of St. Louis, and has complied with the state and local laws, and has been, and is, a duly licensed and registered plumber; that he has expended much money and time in learning the trade of plumbing and acquiring business and trade in St. Louis, Missouri, and that by years of devotion to his said business and trade, the plaintiff has established for himself a substantial and profitable business, which he carried on

successfully for many years until about the year 1899.

"Plaintiff states that these defendants (the said members of the Association of Master Plumbers and the said dealers and manufacturers) have entered into an understanding and combination in writing, combining and conspiring together against this plaintiff, and all other plumbers in this city who are not members of said association of master plumbers, whereby it is agreed and understood by and between these said master plumbers, that these said dealers and manufacturers in and of plumbers' supplies would not and should not sell to any master plumber any plumbers' supplies unless said master plumber desiring to buy said supplies was or first became, a member of said Master Plumbers' Association, and in order to more effectually enforce said agreement and carry out and further said conspiracy, said Master Plumbers' Association and said members thereof agreed and threatened to boycott any dealer found selling to a non-member of the said Master Plumbers' Association, and thereby tried to force and compel this plaintiff to join said Master Plumbers' Association and become a party to said conspiracy and combination, which this plaintiff refused to do, and, solely for the reason that this plaintiff refused to join and become a member of said Master Plumbers' Association and become a party to said unlawful combination, conspiracy, agreement and understanding, and refused to thereby aid and assist these defendants in their unlawful undertaking to create and maintain a monopoly for the purpose of controlling the business of plumbing in St. Louis, Missouri, and to control the price of plumbers' supplies in said city; and to limit and restrict the sale of said supplies as aforesaid, these defendants have for a long time in the past refused, and now refuse, to sell or permit to be sold to this plaintiff, or any other person in the city of St. Louis, any of said plumbers' supplies; that said supply dealers and manufacturers, in furtherance of their part of said wrongful agreement and conspiracy against this plaintiff, and to more effectually carry out and accomplish

the purpose of said combination, entered into an agreement and understanding among themselves and with said master plumbers, whereby it was agreed and understood that if any one of said dealers should sell or permit to be sold any of said supplies to any plumber, or other person in the city of St. Louis, Missouri, who did not belong to said Master Plumbers' Association, said dealer or manufacturer should be fined therefor the sum of $250.

"Plaintiff states that said conspiracy and combination, entered into and carried on, and now being carried on, was and is for the purpose of limiting competition and restricting trade and raising and controlling the prices of plumbers' supplies in the city of St. Louis.

"Plaintiff states that by reason of the aforesaid secret, wrongful and unlawful agreement, understanding, combination and conspiracy among and between these defendants, plaintiff has, for more than one year next before the filing of this suit, been denied by these defendants the right and privilege to buy said plumbers' supplies of the kind necessary and requisite with which to carry on his said business and trade of plumbing, and has been obliged to forego and abandon contracts to do plumbing where he could have earned large profits, but for the wrongful interference and restraint put upon him by these defendants.

"Plaintiff states that on divers occasions he has gone to the various supply houses owned and managed by defendants, and offered and desired to purchase plumbers' supplies; tendering the market price therefor, and that he needed said supplies and material in order to finish and do plumbing that he had contracted and agreed to do, and that defendants refused to sell to him said goods at any price, stating as their reason for so refusing to sell said supplies that he (meaning plaintiff) did not belong to said Master Plumbers' Association, and they (defendants) therefore, could not sell to him (plaintiff) any goods.

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"Plaintiff states that these defendants, conspiring and working together as aforesaid, have driven and forced this plaintiff and many other reputable plumbers, almost, and in many instances entirely, out of business.

"Plaintiff states that by reason of this conspiracy and combination among those defendants, it is useless for him to make, or attempt to make and enter into contracts with his customers to do plumbing work, for the reason that he can not buy supplies and material with which to do and complete said work and contracts.

"Plaintiff states that on many occasions he has purchased from these defendants supplies, and paid for the same, and upon learning that the plaintiff (or person buying said supplies) was not a member of said association, the employees and agents of defendants have compelled plaintiff (or said purchaser) to return said supplies to defendant, and in some instances, the plaintiff, or person buying, or having bought said supplies, has been assaulted, and said supplies were forcibly taken from him by the agents and servants of the defendants engaged in selling said supplies.

"Plaintiff states that the said Master Plumbers' Association, and the said members thereof, have been for a long time, and are now, engaged with said supply dealers and manufacturers in said conspiracy, combination, understanding and agreement; that said conspiracy, combination, understanding and agreement is in violation of the laws of this State; that the same is in restraint of trade and in violation of the rights of the plaintiff, and the general public, and against public policy.

"Plaintiff states that by reason of the said unlawful agreement, combination, understanding and conspiracy, and the wrongful acts of these defendants, he has been greatly injured in his business—that of plumbing; that he has suffered great financial loss and damage by being prevented and restrained from carrying on his said business by reason of these defendants wrongfully re-

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fusing to sell and preventing him from buying goods and supplies with which to carry on his business.

"Plaintiff states that by reason of the aforesaid wrongful acts of these defendants, plaintiff is, and has been compelled to pay exorbitant and high prices for plumbers' supplies, so that he is unable to compete with these defendants in the plumbing business.

"Plaintiff states that the aforesaid defendants, who are engaged in the manufacture and sale of said plumbers' supplies, are all of the persons or corporations known to the plaintiff who are engaged in selling and manufacturing said supplies in the city of St. Louis, Missouri, and that there are no other persons or corporations in said city from whom the plaintiff can buy or obtain said supplies of the kind and quality with which to do and carry on his business of plumbing.

"Plaintiff states that these defendants, who are engaged in the sale and manufacture of said supplies, as aforesaid, heretofore secretly entered into a conspiracy and understanding with these other defendants, the said members of the said Master Plumbers' Association, whereby it was agreed and understood that said dealers and manufacturers would not sell said plumbers supplies to any person in the city of St. Louis, except those who belonged to and were members of said Master Plumbers' Association, thereby intending to limit and restrict the sale and supply of plumbers' supplies to those persons who were members of said Master Plumbers' Association, and that in pursuance of and in carrying out said agreement, understanding and conspiracy, these said defendants have for a long time in the past refused to sell or permit to be sold and now refuse to sell or permit to be sold, to the plaintiff, or any other person, firm or corporation, any said plumbers' supplies, except such person was and is a member of said Master Plumbers' Association.

"Plaintiff states that he is now, and has for a long time in the past been, and will in the future be, unable to purchase from these defendants said plumbers' supplies in the usual course of trade, by reason of said unlawful

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combination, conspiracy, understanding and agreement among and between these defendants, as aforesaid, and that his business and trade has been greatly injured and damaged thereby, and that this plaintiff has suffered great loss and damage by reason of the wrongful and unlawful acts of these defendants, as aforesaid, and that he will continue to suffer great loss and damage in his said business and trade in the future, and that plaintiff's said loss, injury and damage is and will be irreparable if these defendants are permitted to continue to carry out and engage in said unlawful agreement and understanding, combination and conspiracy which they are wrongfully threatening and intending to do, and that plaintiff has no adequate remedy at law.

"Plaintiff states that said agreement and understanding, combination and conspiracy, entered into and being carried out by these defendants, as aforesaid, and all of the said wrongful acts of these defendants done and being done, and the said wrongful intentions of these defendants to continue to do and cause to be done the wrongful and unlawful things herein complained of are in violation of the laws of this State and are in restraint of trade and against public policy.

"Wherefore, this plaintiff prays a temporary writ of injunction be issued against these defendants restraining and enjoining them, and each of them, from doing or causing to be done and from aiding and assisting in any way the doing of any of the acts and things herein complained of, and that said Master Plumbers' Association be declared illegal and the said association be dissolved by the order of this court, and that said Master Plumbers' Association, and the members thereof, be enjoined and restrained from in any way interfering with this plaintiff in his right and effort to purchase said plumbers' supplies from any of these defendants, or any person or corporation in the city of St. Louis that may or shall be engaged now or hereafter in the sale or manufacture of plumbers' supplies, and that, upon a full hearing by this honorable court of this com-

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plaint, said injunction be made permanent as prayed for, and for such other and further relief, orders and judgments as to your honor may seem just and proper, and that defendants be adjudged to pay the costs of this suit."

Defendants demurred to the petition on the following grounds:

"First. Because said petition does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

"Second. Because, upon the averments in said petition, plaintiff is not entitled to the relief prayed for, nor to any equitable relief.

"Third. Because, under the averments in said petition, it appears that for any cause for complaint which plaintiff may have against these defendants, or any of them, he has a complete and adequate remedy at law.

"Fourth. Because if plaintiff has any right of action for any alleged violation of the statutes of Missouri, he is afforded a complete and adequate remedy at law under the provisions of section 8981 of the Revised Statutes of Missouri of 1899.

"Fifth. Because, if any right to proceed in a court of equity exists against these defendants, or any of them, section 8979 of the Revised Statutes of Missouri of 1899, expressly provides that the same shall be brought by the Attorney-General of the State of Missouri, or by the prosecuting attorney of the city of St. Louis."

The court recalled the temporary restraining order thereupon issued, sustained the demurrer and rendered judgment thereon. Plaintiff appealed.

In Hunt v. Simonds, 19 Mo., at page 586, the court said: "It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others."

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The same doctrine is announced in Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410; Carew v. Rutherford, 106 Mass. 13; Brewster v. C. Miller's Sons, 38 L. R. A. (Ky.) 505. Cooley, in his work on Torts (2 Ed.), page 328, states the principle broadly as follows: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

In Walker v. Cronin, 107 Mass. 555, it is said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbances or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria,* unless some superior right by contract or otherwise is interfered with."

A capitalist has the right to employ his capital or to hide it away and refuse to use it, so long as he does not become a public charge, and a man without capital may labor or refuse to labor, so long as he keeps out of the poorhouse. So also have capitalists the right to combine their capital in productive enterprises and by lawful competition drive the individual producer and the smaller ones out of busniess. And laborers and artisans have the right to form unions and by their united effort fight competition by lawful means. Snow v. Wheeler, 113 Mass. 179; Master Stevedores' Association v. Walsh, 2 Daly 1; Reg. v. Rowlands, (1851) 2 Den. C. C. 364. And courts will not lay their hands upon either to restrain them, however fierce the competition, so long as their methods are lawful. But if either steps without the pale of the law and by fraud, misrepresentation, intimidation, obstruction or molestation hinders one in his business or his avocation as an artisan or

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laborer, courts have not hesitated to interfere and to afford remedial relief, either by awarding compensatory damages in an action at law or, where the injury is a continuing one, by granting injunctive relief. Lucke v. Clothing Cutters' and Trimmers' Assembly, etc., 19 L. R. A. 408; Quinn v. Laethem, H. L. I. 495 (1901); Toledo A. A. & N. M. R. Co. v. Pennsylvania Coal Co., 19 L. R. A. 395; Jackson v. Stanfield, 137 Ind. 592; Olive v. Van Patten, 7 Tex. Civ. App. 630; Coeur d'Alene Consolidated & Mining Co. v. Miners' Union, 51 Fed. Rep. 260; Beadle v. Perry, L. R. 3 Eq. 465; Broome v. N. Y. & N. J. Tel. Co., 42 N. J. Eq. 141; Doremus v. Hennessy, 176 Ill. 608.

In Emack v. Kane, 34 Fed. Rep. 46, BLODGETT, J., said: "I can not believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity can not restrain systematic and methodical outrages like this by one man upon another's property rights. If a court of equity can not restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law, in most cases, would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law; but that might imply a multiplicity of suits, which equity often interposes to relieve from. But the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law."

The petition alleges that the agreement between the Association of Master Plumbers and the respondent corporations is for the purpose of fixing prices and limiting the production of plumbers' supplies. Agreements of this character are prohibited by section 8978, article 2, chapter 143, Revised Statutes 1899, and they

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are therefore unlawful. But it is contended by respondents that, conceding the agreement to be unlawful because within the prohibition of said section, the illegal agreement concerns the public only and can only be declared illegal in a suit brought for the purpose by the Attorney-General or the prosecuting attorney of the county as provided by the next succeeding section (8979). Section 8982 of the same article expressly provides that it is the purpose of the article to provide an additional remedy for the control and restraint of pools, trusts and conspiracies in restraint of trade. And it is evident that if the remedy prayed for by appellant existed before the enactment of said article 2, that it is not taken away or in any way abridged by section 8979 of the article.

The contract being unlawful, it remains to be seen whether or not the appellant's private rights were obstructed or interfered with as a result of the illegal agreement. The petition alleges that they were; that he was unable to purchase supplies, on account of said agreement, with which to do his work and was prevented from taking plumbers' contracts for the reason he could not procure the supplies necessary to fill the contracts; that the only reason the respondent corporations have for refusing to sell him supplies is because he is not a member of the Association of Master Plumbers and that one of the purposes of the illegal agreement is to coerce him to become a member of said association.

In Doremus v. Hennessy, 176 Ill. 608, it was held that members of a trade association who combined to induce or compel other persons not to deal nor enter into contracts with one who will not join the association or conform his prices with those fixed by the association will be liable for the injuries caused to him by loss of business resulting from such combination.

In Jackson v. Stanfield, supra, it was held that "A combination of retail lumber dealers to destroy the business of brokers and commission dealers, who did not keep a lumber yard with an assorted stock of lum-

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ber, by coercing wholesalers to refuse to make sales to such brokers or lose the business of the members of such combination, is unlawful and renders a member who procures action by the association to the injury of the brokers liable to the latter for damages." An analogous case is Olive v. Van Patten, supra.

The allegations of the petition show that the respondents have conspired together to boycott the appellant and other master plumbers, of the city of St. Louis, who have not joined the Association of Master Plumbers. A boycott is defined to be an illegal conspiracy in restraint of trade. Casey v. Cincinnati Typographical Union No. 3, 45 Fed. Rep. 135.

In State ex inf. Crow, Attorney-General v. Fireman's Fund Insurance Co. et al., 152 Mo. 1, a conspiracy is defined to be a combination to accomplish an unlawful end by lawful means or a lawful end by unlawful means.

In Mulcahy v. Reg. (1886), L. R. 3 H. L. at page 317, WILLES, J., said: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. . . . The number and the compact give weight and cause danger."

In Reg. v. Warburton (1870), L. R. 1 C. C. 276, COCKBURN, C. J., said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong."

An instructive case in this connection is the House of Lords case of Quinn v. Leatham (1901), H. L. 1 A. C. 495, wherein it was unanimously held that "A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable. The case is interesting in the review made of the case of Allen v. Flood

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(1898), A. C. 1, construing the case as not deciding that boycotting is unlawful.

Applying the doctrine of these cases to the allegations of the petition, there can be no question that the agreement between the respondents is an illegal conspiracy and that its effect is to inflict a civil wrong upon appellant, and that this wrong is a continuing one and, according to all the authorities, entitles the appellant to injunctive relief so far as a court of equity is authorized to administer it within the bounds of equitable jurisprudence. We think it is competent for the court to declare the agreement complained of as illegal and void and to restrain the parties to the agreement from keeping its terms or demanding that they be kept and thus leave the respondent corporations and each of them free to deal or not to deal with appellant as they may choose. In so far as it appears from the allegations of the petition the Association of Master Plumbers is not an illegal association. Presumably it was formed for the purpose of mutual protection and to fight competition in their business within the boundaries of the city of St. Louis. As we have seen, the association may lawfully do this by lawful means and methods to the extent of driving non-members out of the business. We see nothing, therefore, in the petition that would authorize a court of equity to dissolve the association.

The cases of Bohn Mfg. Co. v. Hollis, 54 Minn. 223; Continental Ins. Co. v. Board F. Underwriters, etc., 67 Fed. Rep. 310, and Mogul Steamship Co. v. McGregor, 15 L. R. Q. B. Div. 476, and other cases cited and relied on by the respondents, are cases wherein no illegal conspiracy was proven, but where the parties only exercised the right to trade or not to trade with others and in which there was fierce competition but no unlawful act and are therefore not analogous to the case at bar.

The judgment is reversed and the cause remanded with directions to the circuit court to set aside the order sustaining the demurrer and to overrule the same with leave to respondents to answer if they are so advised.

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Barclay and *Goode, JJ.*, concur; the former concurs in the result.

CONCURRING OPINION.

GOODE, J.—I have consulted many authorities on the propositions involved in this case and think they warrant the following conclusions:

First. The combination of the defendants charged in the petition is a conspiracy to create a monopoly to raise prices and is in restraint of trade and void at common law. Sufficient acts of malice and violence towards this plaintiff are averred to constitute a cause of action. The case stated differs from Hunt v. Simonds, 19 Mo. 583, both in the purpose of the combination, there being no intention in that case to control prices or restrain trade, and in the malicious violence alleged to have been exhibited against this appellant. See United States v. Addystone Pipe & Steel Co., 85 Fed. R. 211, where the cases are collected; Sinsheimer v. United Garment Workers, 26 N. Y. Supp. 152; Casey v. Typographical Union, 45 Fed. 135; Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. Div. 598, L. R. App. Cas. 25, in which the meaning of malice, when said to create a right of action in such cases, is defined. Croff v. McCananphy, 79 Ill. 346. While the particular agreement dealt with in Skrainka v. Scharringhausen, 8 Mo. App. (St. L.) 522 was held valid, the reasoning of the opinion supports Walsh's case and the same is true of Mogul Steamship Co. v. McGregor, supra.

Second. The combination alleged is a positive offense against our present statutes on the subject of pools and trusts, and is made actionable by them. R. S. 1899, sec. 8978 et seq.; State ex inf. v. Firemens' Fund Ins. Co., 152 Mo. 1; U. S. v. Addystone Pipe & Steel Co., supra; People v. Sheldon, 139 N. Y. 251; U. S. v. Jellico Mountain etc., Co., 46 Fed. Rep. 432.

Third. Injunction lies to dissolve the conspiracy and restrain the boycott of and violent acts against the

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appellant, whose allegations show he is specially damaged and that the remedy furnished by the statutes is inadequate because the parties engaged in the conspiracy are numerous and the injuries to appellant continuous; so that a multiplicity of suits would be required to redress his grievances. 2 Eddy on Combinations, sec. 1010; Wire Co. v. Murray, 80 Fed. 811; U. S. v. Sweeny, 95 Fed. R. 434; Butchers Union Slaughter House v. Crescent City Live Stock Co., 111 U. S. 746; Casey v. Typographical Union, Sinsheimer v. United Garment Workers, supra; Jackson v. Stanfield, 137 Ind. 592; Toledo, etc., R'y Co. v. Penn. Co., 19 L. R. A. 387; U. S. v. Jellico Mountain, etc., Co., supra; Emack v. Kane, 34 Fed. R. 47.

The proposition that courts will only act to protect property rights against unlawful interferences like the one charged in the petition, so ably insisted on by respondent's counsel, must be qualified to the extent of regarding a man's right to labor as a property right, or at least as entitled to the same protection property rights are, and so the cases hold, and justly; for power and opportunity to labor is many a man's only capital. United States v. Sweeney, Wire Co. v. Murray, supra; United States v. Kane, 23 Fed. R. 748; State v. Glidden, 55 Conn. 46.

The rule that where a statute creates a right and a remedy to enforce it, the remedy provided is exclusive, only obtains to shut out relief in equity on the ordinary grounds of equitable jurisdiction, in so far as that remedy is adequate. People's R'y Co. v. Grand Ave. R'y Co., 149 Mo. 345; Hickman v. Kansas City, 120 Mo. 110. The statutory remedy is inadequate to redress appellant's wrongs for the reasons heretofore stated.

Neither is the Attorney-General, or some prosecuting attorney, the only party who can proceed against the respondents. The statutes give relief to private persons specially damaged, showing their policy is to protect not only the public, but individuals, against the injurious effects of unlawful combinations; and a pri-

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vate remedy is useful, because it may be called into play as oppression is felt.

As to one person having the right to refuse to deal with another, that may be conceded and the argument built on the proposition namely, that a court of equity is therefore powerless to prevent the wrongs alleged, denied. While any or all dealers in plumbing materials may, *sponte sua,* refuse to sell to appellant, they can not combine and conspire to that end as the statute law now is. The unlawful combination may be decreed dissolved, the respondents restrained from conspiring against appellant and if he still finds himself oppressed by inability to purchase supplies, and makes a showing to the court that it is on account of a continuance of the conspiracy, a case for investigation would be presented, and if the facts satisfied the court its order had been disobeyed, punishment could be inflicted.

I fully concur in *Judge Bland's* opinion.

STATE OF MISSOURI, Respondent, v. WILLIAM E. GILHAM, Appellant.

St. Louis Court of Appeals, December 16, 1902.

1. **Criminal Law:** CRIMINAL PRACTICE: DISQUALIFICATION OF TRIAL JUDGE: STATUTORY CONSTRUCTION. The regular judge of a circuit court, under the provisions of section 2597, Revised Statutes 1899, has a right to decline to preside at the trial of a case for any of the causes mentioned in section 2594, if he is conscious of the existence of any cause which disqualifies him.

2. ——: ——: ——: AGREEMENT TO SELECT SPECIAL JUDGE. The right given the defendant and prosecuting attorney, with the approval of the court, to elect some attorney at law by agreement in writing is permissive only, and in the absence of a showing to the contrary, it will be presumed the right was not exercised.

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3. **Special Judge, How Selected:** CRIMINAL PRACTICE. Under section 2597, Revised Statutes 1899, providing that if in any case the judge shall be incompetent to sit, and no person to try the cause will serve when elected as special judge, the judge of said court shall in either case set the cause down for trial, and request the judge of some other circuit to try the cause.

4. ———: ———. A special judge, called to try a criminal case by the regular judge of the circuit thereof who was disqualified, has the same powers as a regular judge, under sections 2595 and 2597, Revised Statutes 1899, which empower a regular judge of the circuit court to pass upon an application for a change of venue, and to request another judge to serve if the application is granted.

Appeal from St. Louis Court of Criminal Correction.—*Hon. John W. McElhinney,* Special Judge.

AFFIRMED AND TRANSFERRED TO SUPREME COURT.

Thomas J. Rowe and *Paxton & Clark* for appellant.

Judge McElhinney had no jurisdiction to try this cause, and any judgment entered under his supervision has no more validity than one rendered in a moot court of any law school. Section 2597, R. S. 1899; State v. Shipman, 93 Mo. 157; State v. Bulling, 105 Mo. 204.

H. A. Clover, Dodge & Mulvihill and *Thos. B. Harvey* for respondent.

The only proposition seriously contended for by appellant in his brief is that Judge McElhinney was not invested with jurisdiction to try the cause; and appellant cites nine Missouri cases, not a single one of which is in point or sustains his contention. (2) Was Judge McElhinney clothed with jurisdiction? The steps by which such jurisdiction was conferred were as follows: The incumbent judge, the Hon. Willis H. Clark, voluntarily entered an order disqualifying himself, and notified and requested the Hon. E. M. Hughes to try the case; and upon Judge Hughes' failing to appear to

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try the case, Judge Clark then notified and requested Hon. J. T. Neville to appear and try the case, who did appear and assume jurisdiction over the cause and upon defendant filing a plea in abatement, denied the same, ordered a jury, etc.; and thereupon the defendant filed affidavit under section 2594, Revised Statutes 1899, disqualifying Judge Neville, and thereupon Judge Neville made an order notifying and requesting the Hon. J. W. McElhinney to appear and try the cause, who did appear at the time requested, assumed jurisdiction and tried the cause with a jury. (3) We insist that Judge McElhinney was fully vested with jurisdiction. There can be no question about the propriety of Judge Clark's order disqualifying himself under section 2595, Revised Statutes 1899; and the order need not state the reason nor ground of such disqualification. State v. Newsum, 129 Mo. 159; State ex rel. v. Wear, 129 Mo. 624.

GOODE, J.—On December 5, 1900, an information was filed against the appellant in the St. Louis Court of Criminal Correction charging him with a criminal offense. Subsequently an amended information was filed. On the said fifth day of December, the date of the filing of the first information, Honorable Willis H. Clark, the regular judge of said court, voluntarily disqualifying himself to try the cause against the appellant and called in Judge E. M. Hughes of the Eleventh judicial circuit to try it. As Judge Hughes failed and refused to sit, Judge Clark called in Judge Neville of the Twenty-third judicial circuit, the appellant objecting and excepting to that order.

Afterwards on February 28, 1901, affidavits were filed by the appellant disqualifying Judge Neville; whereupon on the same day that judge made an order calling in Hon. J. W. McElhinney of the Thirteenth judicial circuit to sit in the case, to which order the appellant at the time objected and excepted.

The cause was tried before Judge McElhinney, the

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defendant found guilty and his punishment assessed at $200, from which judgment he appealed.

The authority of Judge Clark to call in Judge Neville after the first-named judge had disqualified himself, and also of Judge Neville after he was disqualified by affidavits filed by the appellant, to make an order calling in Judge McElhinney, are both questioned, as is the jurisdiction and authority of Judge McElhinney to proceed in the case. The decision of these questions turns on the construction of the statutes relating to changes of venue generally, and those relating especially to changes of venue in criminal cases.

Unquestionably the regular judge of the court had a perfect right to decline to preside at the trial if he was conscious of the existence of any cause which disqualified him, and it was his duty in that event to decline to preside. R. S. 1899, sec. 2595.

He likewise had the power to call in the judge of some other circuit, and we think the proper construction to be given to the statute now in force is, that he could do this without previous proceedings in the way of electing or agreeing on a judge.

Section 2597 (R. S. 1899), so far as it is pertinent to the matter in hand, reads as follows:

"If, in any case, the judge shall be incompetent to sit for any of the causes mentioned in section 2594, and no person to try the case will serve when elected as such special judge, the judge of said court shall, in either case, set the cause down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said cause; and he shall. during the trial of said cause, possess all the powers and perform all the duties of a circuit judge at a regular term of such court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said cause to the circuit court of another county in the

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same circuit, or to another circuit; and whenever said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said cause in the circuit court of the county to which said cause shall be removed; *provided,* that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said cause, the judge of said court shall reset said cause for trial, to suit the convenience of the judge so requested to try said cause, or may notify and request the judge of some other circuit to appear and try said cause, as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said cause, the judge of the court shall order a change of venue in said cause to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which such cause is pending."

Appellant contends that by virtue of that statute a special judge must have been elected and have refused to act before the regular judge had authority to call in the judge of another circuit. That was the construction given to the statutes bearing on changes of venue generally and those regulating it in civil cases (which, as to the point involved, seems not to have differed materially from the statutes regulating that proceeding in criminal cases) as they stood prior to their amendment in 1895. State ex rel. v. Bacon, 107 Mo. 627. But, as the law then stood, an election by the members of the bar was provided for in case the regular judge was disqualified; and the judge of another circuit could not be called in except on the refusal of an elected special judge to preside, or unless in the opinion of the regular judge no suitable person could be elected. Now, however, the only election provided for by the statutes is either the election, if such it may be called, spoken

of in section 2594, by agreement in writing of the prosecuting attorney and the defendant with the concurrence and approval of the court; or, under section 1679, by the members of the bar, the last-mentioned section applying, as has been ruled, to both civil and criminal cases. State v. Downs, 164 Mo. 471.

But there was no statute in force when this case was tried making the election of a special judge to try the cause in which the regular judge was disqualified, mandatory; at least in such sense that the record must affirmatively show the statute was complied with by electing one. State ex rel. v. McKee, 150 Mo. 233; State v. Wear, 129 Mo. 619; Id., 145 Mo. 162; State v. Newsum, 129 Mo. 154. The right given defendant and prosecuting attorney, with the approval of the court, to elect some attorney at law by agreement in writing, has been ruled to be permissive and in absence of a showing to the contrary, it will be presumed the right was not exercised. State ex rel. v. McKee, State v. Wear, supra. We hold that the order of the regular judge of the court of criminal correction requesting Judge Neville to try the case after Judge Hughes refused to do so, was valid.

It is contended that Judge Neville had no power to ask Judge McElhinney to sit after he (Neville) was disqualified by the affidavits of the appellant and compurgators and our first opinion, based on certain remarks of the Supreme Court in the cases of State v. Silva, 130 Mo. 440, and State v. Hudspeth, 159 Mo. 178, was that this point was well taken. But on further reflection two of us have concluded that we misconstrued the language of the Supreme Court in those cases, wherein it was decided that the special judges first requested to sit had no power to call in other special judges in lieu of themselves, and that the requests to the second special judges were rightly made by the regular judges of the courts wherein the cases were pending—that the latter had power to make those requests and the first special judges had not. But we failed to note closely the circumstances with which the Supreme

Court was dealing. In the Silva case Judge Hirzel, who was first asked to preside as special judge, refused to qualify, and in the Hudspeth case, Judge Shackleford did qualify and preside at one trial, but the case was reversed on appeal and in the meantime he had resigned the office of circuit judge. Judge Hirzel's refusal to qualify was held equivalent to a resignation; and it was in view of the fact that he never took hold of the Silva case and of the fact that Judge Shackleford lost the right to act in the Hudspeth case by resigning his office, that the Supreme Court said those two special judges were powerless to request other judges to preside and that, therefore, *ex necessitate,* such request had to be preferred by the regular judges of the courts where the cases were. The present case is distinguished from the Silva case by the fact that Judge Neville qualified, and from the Hudspeth case by the fact that he was still circuit judge when it became necessary to call in another special judge to take his place.

We think the inability of Judges Hirzel and Shackleford to request any one else to sit in their stead was due to the circumstances mentioned, and that a similar inability does not attach generally to all special judges. Those officers have been construed to have, *pro hac vice,* the same powers a regular judge has. State v. Hayes, 88 Mo. 344; State v. Higgerson, 110 Mo. 213; Rawlins v. Timons, 80 Mo. App. (K. C.) 84; Dawson v. Dowson, 29 Mo. App. (St. L.) 521. By section 2595 of the Revised Statutes of 1899, one of the powers of the regular judge of a circuit court is to pass upon an application for a change of venue on account of his alleged prejudice; while by section 2597 he is empowered to request another judge to sit if he grants the application; if the application happens to be made to a special judge, he should have equal authority to act in the matter. The power of either a regular or a special judge, after disqualification, ought to extend at least to procuring a successor to try the case; and it seems to extend no further. State v. Shipman, 93 Mo. 147; State v. Schaffer, 36 Mo. App. (K. C.) 589.

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As Judge Neville qualified and assumed jurisdiction of the case against the defendant, we hold his order, made on granting the appellant's application for a change of venue, asking Judge McElhinney to try the case, was legal.

Testimony to prove the appellant guilty of the offense he was accused of was abundant, and the instructions requested to the effect that there was no such evidence, and that the jury should acquit him, were justly refused.

The points already treated are those mainly relied on for a reversal; so, without setting out the instructions at length, we state that the rulings on them meet our approval.

The judgment is, therefore, affirmed. *Barclay, J.*, concurs; *Bland, P. J.*, dissents on the ground that he deems the decision in conflict with the decisions of the Supreme Court in State v. Silva, and State v. Hudspeth, supra, and with section 1682, Revised Statutes 1899. The cause is therefore certified to the Supreme Court.

EDWARD GILDERSLEEVE, Appellant, v. H, OVERSTOLZ, Respondent.

St. Louis Court of Appeals, December 16, 1902.

1. **Evidence:** INJUNCTION: REMEDY AT LAW: PRACTICE, TRIAL: PRACTICE, APPELLATE: BILL OF EXCEPTIONS. In the case at bar, the evidence preserved in the bill of exceptions fails to show that plaintiff did not have an adequate remedy at law: *Held*, injunction will not lie.

2. **Judicial Notice:** COURTS OF APPEALS: PRACTICE, APPELLATE. The Court of Appeals takes judicial notice of all of its records and proceedings.

3. **Injunction:** POSSESSION: TRESPASS TO REAL ESTATE. One out of possession can not maintain injunction for a trespass to real estate.

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Appeal from St. Louis City Circuit Court.—*Hon. O'Neill Ryan*, Judge.

AFFIRMED.

Hiram N. Moore for appellant.

(1) Under the evidence in this case it is conclusively shown that plaintiff was the owner of certain property, engaged in a legitimate business, and using said property in the pursuit of his business. That defendant, wrongfully and without any authority at law whatever, was proceeding to demolish and destroy said property, when, in the midst of his unlawful act, he was restrained by an order of the circuit court. Under the evidence and the law the judgment ought to have been for the plaintiff. (2) The work of destruction had not been completed at the time the writ was served. (3) Even if such had been the case, it would constitute no defense to this action. Albers v. Merchants' Exchange, 39 Mo. App. 590; Russel v. Railway, 36 Mo. App. 372. (4) The threatened damage to plaintiff's property was not capable of fair estimation, and could not be fully compensated by an action at law. Even if such damage could have been fairly estimated under the circumstances of this case, the writ should go. Kercheval v. Bank, 65 Mo. 682.

BLAND, P. J.—This is a suit for an injunction to restrain the defendant from committing a trespass and waste on premises at No. 106 North Broadway, in the city of St. Louis, occupied by plaintiff as lessee.

An examination of the evidence preserved in the bill of exceptions utterly fails to show that plaintiff did not have an adequate remedy at law. On the other hand, an examination of the records and proceedings of this court—of which we take judicial notice—shows that plaintiff sued for and recovered of defendant all the damages he sustained by reason of the trespass, and punitive damages in addition thereto. Gildersleeve v. Overstolz, 90 Mo. App. (St. L.) 518.

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The evidence further shows that after plaintiff was forcibly turned out of the premises, he never regained possession thereof. One out of possession can not maintain injunction for a trespass to real estate. Powell v. Canaday, 96 Mo. App. 27.

The judgment is affirmed. *Barclay* and *Goode, JJ.*, concur.

RUFUS E. HOLMES et al., Appellants, v. J. W. FARRIS, Respondent.

St. Louis Court of Appeals, December 16, 1902.

1. **Action on Note:** FAILURE OF CONSIDERATION. In an action between payee and maker of a note, defendant sought to prove that the paper was given upon the conveyance of title to land of the payee on agreement by defendant to attempt to sell the same for account of the payee, failing in which, the land was to be reconveyed: *Held,* that these facts, in the circumstances stated in the opinion, tend to show a failure of consideration.

2. ——: ——: BURDEN OF PROOF. Under section 894, Revised Statutes 1899, a promissory note in Missouri, imports a consideration, until the contrary is shown; and the burden of proof is on defendant to prove a want of consideration.

3. **Parol Evidence:** STATUTORY CONSTRUCTION. A promissory note may not be contradicted by oral evidence of a contemporary agreement that it is not to be paid according to its terms, but this rule does not forbid proof of want or failure of consideration (Revised Statutes 1899, section 645).

4. **Promissory Note:** ACTION ON NOTE: EVIDENCE: PROOF: PRIMA FACIE CASE. In a suit upon a note whose execution is admitted, the payee makes out a prima facie case by the production of the note.

5. **Practice, Appellate:** REVIEW OF ACTION OF TRIAL COURT: ERROR: PRESUMPTION. In cases where the appellate court has authority to review the facts, it may discard incompetent evidence without reversing the judgment on that account; but in an action at law, upon trial by the court, the admission of incompetent evidence is reversible error unless the appellate court is convinced that no prejudice resulted therefrom to the party appealing.

6. ——: ——. Error is presumed to be prejudicial until it is clearly shown to be harmless.

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Appeal from Laclede Circuit Court.—*Hon. L. B. Woodside,* Judge.

REVERSED AND REMANDED.

White & M'Cammon for appellant.

(1) The contract, the note sued on, was plain and unambiguous in its terms, and the testimony squarely contradicts it. It is an agreement to pay, and the evidence offered is to the effect that it was not to be paid, except upon certain conditions. The note, the deed of trust and the deed embodied the entire transaction and left nothing to be added. It was a complete contract in all its terms. The note was due in three years, a contract not to be formed within a year. Being thus within the statute of frauds, oral testimony could not be invoked to add another stipulation. (2) A trust, such as sought to be shown in this case, is within the statute of frauds and must be in writing. R. S. 1899, sec. 3416; Rogers v. Ramsey, 17 Mo. 598; Wies v. Heitkamp, 127 Mo. 23. (3) If, in order to attack the consideration of the note, the defendant seeks to show the deed for which it was given is without consideration, he is equally at variance with the authorities. The recited consideration in a deed may be explained; a different consideration may be shown; or an additional one. But it can not be shown that there was no consideration, so as to create a resulting trust. Weiss v. Heitkamp, 127 Mo. 30; Bobb v. Bobb, 89 Mo. 412; Rogers v. Ramey, 137 Mo. 608. (4) Nor can a consideration be shown inconsistent with the terms of the grant. Nor attack to defeat the operative words of the deed. Nor in any manner that would show a resulting trust. Bobb v. Bobb, supra; Hickman v. Hickman, 55 Mo. App. 303; McConnell v. Brayner, 63 Mo. 464. (5) In other words, the defendant can not be permitted to say that he paid nothing for the land, and that therefore a trust results in the grantor. He receives the beneficial interest in the land and therefore his note

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is supported by a good consideration. He can not show a resulting trust, any more than he can show an express one, though in this case the answer attempts to plead an express trust.

J. W. Farris pro se.

(1) The suit at bar is a simple action on a note between the original payee and payor, and is governed by the law merchant, and not by the law affecting real property. Owings v. McKenzie, 133 Mo. 323; Hawes v. Hunholland, 78 Mo. App. 493. (2) It is a principle of law, universally recognized, that a note without consideration, unless in the hands of an innocent holder, can not be recovered upon. "A note without consideration, the original object of its making having failed, should be returned to the maker." Bank v. Dreyfus, 82 Mo. App. 399; Danford v. Crookshanks, 68 Mo. App. 311; Creasey v. Gray, 88 Mo. App. 454; Leavitt v. Taylor, 163 Mo. 158; Borgess Investment Company v. Vette, 142 Mo. 560.

BARCLAY, J.—Plaintiff brought this action by a petition in the ordinary form upon a promissory note, expressed to be for value received, whereby defendant promised to pay to plaintiffs or bearer, November 1, 1899, $400, with interest, etc. The note was dated Kansas City, Missouri, October 23, 1896.

The answer of defendant admits the execution of the note, alleges that it was given "without any consideration whatever," and then sets up a special defense to the effect that plaintiffs conveyed to defendant a certain tract of land to be sold for them by him and that defendant executed to plaintiff a note for $400, secured by a deed of trust on the land, neither deed nor note to be binding unless the land was sold, which it was not; and that when the note became due and the land remained unsold, defendant tendered back to plaintiffs the deed to said land, which they refused to accept, but foreclosed the deed of trust, and recovered the land.

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The cause was tried by the court, a jury having been waived.

Plaintiffs introduced the note with indorsements showing that a credit of $25 had been given defendant on the note by the last foreclosure sale of the land to plaintiffs, June 25, 1900.

Defendant was then sworn on his own behalf. Plaintiffs objected to any evidence by him on the ground that he sought to contradict the written instrument by parol evidence, and that the statute of frauds was a bar on the ground that the note was not to be performed within a year and hence that any oral modifications or additions thereto must be shown in writing. These objections were made preliminary to any testimony of the defendant.

The substance of defendant's testimony is that he had been a loan agent for Holmes & Company of Kansas City, and that they afterwards became Holmes Brothers. He had made a loan upon some land (120 acres) near Richland, Missouri. The loan becoming due the mortgage was foreclosed, and Mr. Ed. Holmes in consequence bought in the land at the sale. Mr. Holmes complained that the loan had been a bad one, whereupon plaintiff said that he thought that the land was easily worth the debt. Mr. Holmes then desired defendant to take it for the debt. Defendant declined to do so, but said he would try to sell it for them. It was then agreed between Mr. Holmes and defendant that the land should be "deeded" to the defendant and the latter would give to plaintiffs the note in suit, secured by deed of trust on the land. It is to be inferred that this would be the purchase price in event of a real sale; and meanwhile defendant was to pay interest to plaintiffs at six per cent per annum while the note ran, namely for three years. This he did and he also paid the taxes for the same period. In case the land was sold the note was to become effective but if it was not sold then plaintiff was to make no claim on account of the principal thereof.

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It does not seem essential to narrate the full particulars of the evidence. It certainly tended to show a want of consideration for the paper sued upon in the failure of the sale, the prospect of which was the moving inducement to the making of the note.

But in the progress of the trial, and against the earnest objection and repeated exception of counsel for plaintiffs, the defendant was permitted to state that it was a part of the agreement that the note should not be paid, in case the land was not ultimately sold.

Plaintiffs put in evidence all the documents appertaining to the original transaction, including a quitclaim deed to defendant and his deed of trust to their trustee, securing the said note.

No other contradiction of defendant's version of the affair was given in evidence.

No instructions were asken or given on either side.

The trial court found for the defendant and plaintiffs appealed, after the usual formalities.

1. The precedents in Missouri are firmly anchored to the rule of law that a promissory note, even in the hands of the original payee, may not be contradicted by oral evidence of the maker to the effect that the note was not to be paid according to its terms. The reasons of this rule have been so often stated that we do not consider it necessary to go over that ground again. Jones v. Jeffries, 17 Mo. 577; Smith's Admrs. v. Thomas, 29 Mo. 307; Jones v. Shaw, 67 Mo. 667; Gardner v. Matthews, 81 Mo. 627; Sigler v. Booze, 65 Mo. App. (K. C.) 555.

2. The foregoing rule, however, does not forbid the appropriate application of the Missouri statute concerning proof of want or failure of consideration. The law on that subject is expressed by a section the greater part of which has been for many years in force, as follows:

"Whenever a specialty or other written contract for the payment of money, or the delivery of property, or for the performance of a duty, shall be the foundation

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of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of the consideration, in whole or in part, of such specialty or other written contract." R. S. 1899, sec. 645; R. S. 1845, ch. 136, sec. 21.

It is competent for a maker of a note as against the payee to show that there was no consideration in whole or in part for the instrument sued upon, with a view either to defeat or to reduce the recovery claimed thereon, as the case may be.

Upon the facts disclosed by this record we are of opinion that there was testimony from which a court might reasonably find there was a failure of consideration for the paper which was the foundation of the action. Chicago Title & Trust Co. v. Brady, 165 Mo. 197 (65 S. W. Rep. 303). At the same time we hold that several items of evidence which the court admitted conflicted with the principle of law declared in the first paragraph of this opinion.

We can not know what weight or influence the court gave to the incompetent facts which were so gleaned from defendant as a witness at the last trial.

It is now a settled doctrine of our procedure that where error appears it is presumed to be prejudicial unless the appellate court can clearly see that it was harmless. State v. Taylor, 118 Mo. 153.

The learned trial judge sat as a jury in this case. As he permitted the incompetent facts aforesaid to be given in evidence, it is fair to assume that he gave weight to those facts in forming his judgment.

Where an appellate court has lawful authority to pass upon the facts on appeal it may discard incompetent evidence and pronounce its conclusion upon the legal testimony remaining, as is often done in equity cases. Padley v. Neill, 134 Mo. 375; Supreme Lodge v. Schworm, 80 Mo. App. (St. L.) 64.

But this is an action at law. We can not be sure that the incompetent testimony was disregarded by the

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court. If any inference on that point may be drawn we should infer that it was considered along with the other testimony.

The recital of value received, as the consideration of a note such as that in suit, may be disputed (under the Missouri law quoted) by proof, otherwise competent. But evidence of an agreement by which a note is not to be paid according to its tenor and terms is incompetent to support a plea of want of consideration.

There is no plea or contention by defendant of any fraud as a defense. So the items of defendant's own testimony as to agreements contradicting the note and its promise to pay, were clearly inadmissible.

If there is a consideration for the note then such an agreement would be wholly nugatory. If, on the other hand, the note was without consideration (or the consideration failed) the agreement that the note should not be payable would add nothing to the inference of the law from that fact.

3. The plaintiffs made out a prima facie case by the production of the note which, under our state law as well as by the law merchant, import a consideration until the contrary is shown. R. S. 1899, sec. 894.

The burden of proof was upon defendant to establish by a preponderance of the evidence the want of consideration he alleged. The trial court found in his favor on that issue, but did so after admitting into the scales of justice the items of testimony which we find were not entitled to a place there. What weight was given to those incompetent items of proof we may not know. We can not justly pronounce their admission harmless. Bank v. Froman, 129 Mo. 427; Shoe Co. v. Hillig, 70 Mo. App. (St. L.) 309.

The judgment is reversed and the cause remanded for a new trial. *Bland, P. J.*, and *Goode, J.*, concur, the latter in reversal only not in holding that defendant may not show the note was not to be paid unless he sold the land.

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OPINION ON MOTION TO MODIFY JUDGMENT.

PER CURIAM.—It is competent as between the payee and maker of a negotiable promissory note to prove by oral testimony, want or failure of consideration. Sec. 645, R. S. 1899; Cheatham v. Hill, 29 Mo. 311; Howard v. Brown, 23 Mo. App. (K. C.) 69; Chicago Title & Trust Co. v. Brady, 165 Mo. l. c. 208. And for the purpose of showing want or failure of consideration it is competent to prove the contract out of which the note grew. Chicago Title & Trust Co. v. Brady, supra; Leighton v. Bowen, 75 Me. 504; Coal & Iron Co. v. Willing, 180 Pa. 165; Gale v. Harp, 64 Ark. 462; Juilliard v. Chaffee, 92 N. Y. 529; Shoe & Leather Nat. Bk. v. Wood, 142 Mass. 563; Trustees v. Hoffman, 95 Mo. App. 488.

The answer of defendant is as follows:

"1. Now comes the defendant, and for his answer to plaintiffs' petition, admits that he executed the note sued on.

"2. Defendant, further answering, says that said note was given without any consideration whatever and is now in the hands of the original payees, who are the plaintiffs, and that there is nothing due on said note.

"3. Defendant, further answering, states to the court that plaintiffs conveyed to him a certain tract of land for him, the defendant, to sell for plaintiffs, and the amount for which plaintiff had taken said land on a loan debt, was $400, and that this defendant executed the note sued on for said sum of $400, and gave a deed of trust on said land. That neither the deed to defendant nor the note to plaintiffs were to be binding on the parties, unless this defendant succeeded in selling said land, which he failed to do. That when said note became due, defendant tendered plaintiffs a deed to said land without any cost, which they refused to accept, but incurred an expense of $50 in such foreclosure, and charges the same to defendant, which is unjust, and was wholly unnecessary. That plaintiffs have recovered

said land, and lost nothing by this defendant, and he owes them nothing.

"4. Defendant denies every act and every allegation in said petition not herein specifically admitted, and having fully answered asks to be discharged with costs."

Had defendant stopped with the second paragraph of his answer we think he might have shown the contract out of which the note grew, if the contract proved or tended to prove want of consideration for the note.

The third paragraph is a statement in detail of the facts of the transaction and alleges "that neither the deed to defendant nor the note to plaintiffs were to be binding on the parties, unless this defendant succeeded in selling said land, which he failed to do." In other words, it is alleged that the note was to be paid only on the happening of a contingency. It is well-settled law in this State that oral evidence is not admissible for the purpose of proving that a negotiable promissory note, absolute on its face, was to be paid on the happening of any contingency. Jones v. Jeffries, 17 Mo. 577; Foote v. Newell, 29 Mo. 400; Massmann v. Holscher et al., 49 Mo. 87; Conrad v. Howard, 89 Mo. 127; Henshaw v. Dutton, 59 Mo. 139; Henshaw v. Dutton, 67 Mo. 666; Jones v. Shaw, 67 Mo. 667; Hurt v. Ford, 142 Mo. 283; Ins. Co. v. Buchalter, 83 Mo. App. (K. C.) 504; Barnard State Bank v. Fesler, 89 Mo. App. (K. C.) 217.

By the third paragraph of his answer the defendant has so qualified his defense, "that the note was given without any consideration," as to show affirmatively that what he means by want of consideration is that the note was not to be paid unless he succeeded in selling the land, that is, the note was to be paid only on the happening of a contingency, and that the contingency upon which the note was to become payable has not happened.

The third paragraph of the answer negatives the plea of want of consideration for the note and discloses that the defense relied upon by defendant was that the

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note was to be paid only on the happening of a contingency, to-wit, that defendant could succeed in selling the land. We think the answer fails to state any legal defense to the note. The defendant may be able to so frame his answer as to state a valid defense.

The motion to modify the opinion heretofore filed is overruled and the judgment is reversed and cause remanded with leave to defendant to amend his answer if so advised. *Goode, J.*, concurs in the reversal of the judgment, but not in the ruling that the defendant may amend his answer and then prove orally that he was merely a trustee of the land and that the note was not to be paid until he sold it; the other judges concur in full.

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LEO G. HADLEY et al., Respondents, v. DAVID BERNERO et al., Appellants.

St. Louis Court of Appeals, December 16, 1902.

1. **Justices' Courts:** UNLAWFUL ENTRY AND DETAINER: APPEAL TO CIRCUIT COURT. An appeal from the judgment of a justice in an unlawful entry and detainer action is returnable to the circuit court within six days after the rendition of the judgment, if the judgment is rendered during a term of the circuit court to which the appeal is taken.

2. **Term of Court:** DEFINITION OF: VACATION: DEFINITION OF: STATUTORY CONSTRUCTION. The word "term," in the statute on the subject, signifies the entire period from the first day of the term, as fixed by law, to its close; and the word "vacation" signifies the period between the final adjournment of one term and the beginning of another.

3. **Appellate Courts:** JUDICIAL NOTICE: CIRCUIT COURTS: PRACTICE, TRIAL: PRACTICE, APPELLATE. Appellate courts will take judicial notice of the terms of the circuit courts as provided by the statutes, but not when terms are ended by final adjournments, although any court may take notice from its records of its own session; this court must presume that the circuit court rightly exercised jurisdiction.

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4. **Appeal Bond:** SUMMARY JUDGMENT: ERROR: SURETY, LIABILITY OF. A summary judgment against a surety on an appeal bond, in an unlawful entry and detainer case, is erroneous, but the judgment need not be reversed as a whole for that reason, but may be treated as a nullity against the surety.

5. **Lease:** STIPULATION TO DELIVER PREMISES: COVENANT: RIGHTS OF REVERSIONER. A stipulation in a lease that, if a sale of the property shall be made during the continuance of the lease, the lessees will vacate and deliver up possession on thirty days' notice in writing, is a covenant which runs with the reversion, and enures to the benefit of the grantee of the fee.

6. **Judgment:** NOMINAL DAMAGES. A judgment for twice the value of the monthly rents and profits of the premises is rightly given in an unlawful detainer case, for the wrongful detention of the premises after notice to vacate, and the stipulation made by the parties in the case at bar did not confine the damages for detention to a nominal sum.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

AFFIRMED.

Vernon W. Knapp for appellants.

(1) All of the evidence presented at the trial in the circuit court is preserved in the bill of exceptions, and the only evidence therein of the amount of damages is contained in the agreement that those damages amounted to one dollar. It was therefore error to allow a greater amount of damages in the verdict. Moore v. Dixon, 50 Mo. 424; Balch v. Myers, 65 Mo. App. 422. (2) The statute concerning bonds on appeals from justices court in suits of unlawful detainer does not authorize a summary judgment against sureties on the appeal bond as in ordinary cases brought up from justices. Powell v. Camp, 60 Mo. 569. It was therefore error to give judgment as was done in this case against the defendants and the surety on the bond, and the judgment ought to be reversed on that account.

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Jesse A. McDonald for respondents.

(1) The clause in the lease providing for the termination of the tenancy is a condition in the nature of a covenant which runs with the land, and the language employed shows clearly the intent of the parties that it should go with the reversion. Roe v. Hayley, 12 East. 464; Callan v. McDaniel, 72 Ala. 96; Same Case, 75 Ala. 327. (2) And otherwise the condition would be ineffectual, as it only becomes operative in the event of a sale, and after a sale the lessor, by reason of lack of interest, could not exercise the option of terminating the lease. Griffin v. Barton, 49 N. Y. Sup. 1021. (3) There is no ambiguity in the clause in the lease. It is a covenant for the benefit of the owner of the reversion and he is the person by whom the notice should be and was given. Taylor v. Frohock, 85 Ill. 584; Johnston v. King, 83 Wis. 8. (4) And the forcible entry and detainer statute provides that "the determination of any lease by forfeiture shall, within the purview of this chapter, have the same effect as if the term thereby created had expired." Sec. 3354, R. S. 1899. (5) The defendant's term having been brought to an end on July 31, 1901, by the plaintiff's notice, their holding over that day made them guilty of an unlawful detainer. "If a lease does not require any particular form of notice of the election to terminate it, a notice in general terms is sufficient. Leases for terms of years quite often confer upon the lessee an option to terminate the lease before the expiration of the term and reserve to the lessor a similar privilege. . . . Where the term was assigned by the lessee a privilege of terminating the lease conferred on the lessee inures to the benefit of the assignee; and where the reversion is conveyed a similar privilege conferred on the lessor inures to the benefit of the grantee of the reversion." 18 Am. and Eng. Ency of Law (2 Ed.), p. 630.

GOODE, J.—In January, 1899, one A. J. Geraghty, owner, leased certain premises in the city of St. Louis,

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for and during the term of five years to commence July 1, 1899, to Vincent Bernero and David Bernero, and the last clause in the lease read as follows:

"It is further agreed between the parties hereto, that should a sale of said property be made during the continuance of this lease, said lessee will vacate and deliver up possession of said property upon a thirty days notice in writing, so to do."

The lessees entered into possession of the premises under this lease and were at the time of the beginning of this action, and still are, in possession. The lessees together with their subtenants, Henry Robbins and William Bedford, are the defendants and appellants in this case.

On May 28, 1901, the lessor, A. J. Geraghty, sold the premises to Bradford Schinkle. On June 5, 1901, Bradford Schinkle sold the property to Leo G. Hadley and Owen M. Dean, the plaintiffs in this action.

On the twenty-eighth day of June, 1901, one Manley W. Mann (as agent for plaintiffs) delivered to the lessees a paper notifying lessees to vacate and deliver up possession on or before October 1, 1901, which paper is the alleged notice under the last clause of the lease.

On the fourth day of September, 1901, plaintiffs filed their complaint before a justice of the peace for unlawful detainer, and on October 18, 1901, the justice of the peace rendered judgment against the defendants.

On the twenty-sixth day of October, 1901, more than six days after the justice rendered judgment, defendants filed their affidavit for appeal and recognizance, and on that day the bond was approved, and an order allowing the appeal was made by the justice.

At the trial of the cause in the circuit court the following agreement was introduced in evidence, to-wit:

"It is agreed between counsel for plaintiffs and counsel for defendants, that the damage to the property of defendants since August 1, 1901, is one dollar, and that a fair rental value of the premises was seventy

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dollars per month on and from August 1, 1901, and is the same to-day."

Defendants were found guilty of unlawful detainer as charged in the complaint, and plaintiffs' damages assessed at the sum of four hundred and ninety-five dollars, and the value of the monthly rents and profits at seventy dollars. The court thereupon rendered judgment that the complainants have restitution of the premises described in the complaint and recover of the defendants and Louis Bernero, surety on the appeal bond the sum of nine hundred and ninety dollars damages and also at the rate of one hundred and forty dollars per month for rents and profits from the date of the judgment until restitution be made, together with their costs and charges, and have execution therefor.

Points made for a reversal are that the circuit court acquired no jurisdiction of the appeal; that it erroneously entered judgment against the surety on the appeal bond; that the conveyance of the reversion did not transfer to the assignee the benefit of the covenant to vacate on thirty days' notice if a sale was made, and that no more than nominal damages for withholding the premises could be rightly adjudged against the defendants.

1. The jurisdiction of the circuit court is challenged on the ground that as the judgment of the justice of the peace was rendered during the October term of the St. Louis Circuit Court and eight days before the appeal was applied for and granted, the circuit court was without jurisdiction of the cause, since the statutes make appeals in forcible entry and unlawful detainer actions returnable within six days after the rendition of judgment, if the judgment is rendered during a term of the circuit court to which the appeal lies. R. S. 1899, sec. 3370.

(a) Appellants admit that no proof was offered at the trial of this cause in the circuit court, which occurred during the March term, 1902, to show said court was not in vacation on the eighteenth day of the preceding October, when judgment was given by the

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justice of the peace; but they contend that the circuit court should have taken judicial notice of the fact that that day was in term time and have dismissed the appeal.

As to the meaning of the sections of the statutes bearing on this question, we think they use the word "term" to signify the entire period from the first day of a term as fixed by law to its final close, and the word "vacation" to signify the period between the adjournment of any term and the beginning of another, not merely an interval when the court is not in session from having adjourned for more than a day but not to court in course. Brayman v. Whitcomb, 134 Mass. 526; Bonson v. Schulten, 104 U. S. loc. cit. 415; State v. Derkum, 27 Mo. App. (K. C.) 628. By this construction, a temporary adjournment of the St. Louis Circuit Court would not have relieved the appellants of the duty to perfect their appeal from the judgment of the justice of the peace if given in term time, inside of six days after its rendition.

We may take notice of the terms of our circuit courts as prescribed by the statutes, and that one of the terms of the St. Louis Circuit Court began on the first Monday in October, 1901; but we can not know officially when the term finally closed. A court may take notice of its own sessions, adjournments and vacations from its records; but for some other tribunal to learn those things, evidence must be adduced, and for an appellate court to know them the evidence must be preserved. Robinson v. Walker, 45 Mo. 117; Bauer v. Cabanne, 11 Mo. App. (St. L.) 114; Dudley v. Barney, 4 Kan. App. 122; Kent v. Bierce, 6 Ohio 336.

As the trial court retained and decided this cause, we must presume it did so properly in the absence of proof to the contrary—must presume it found the appeal from the justice of the peace was in time, because taken during vacation between the October and December terms. This was ruled in Bauer v. Cabanne, supra, where it was said:

"The circuit court may rightly take judicial notice

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from its own records of the times when it is in vacation and when it is in session. In the absence of any showing or suggestion that such were not the facts, we must presume, in support of the action of the court, that it did take official notice of such facts from its records."

In Kansas City v. Clark, 68 Mo. 588, and Feurth v. Anderson, 87 Mo. 354, it was said that an appeal from an inferior court will be presumed to have been taken within the time allowed by law, when the record shows nothing to the contrary; and favorable suppositions are generally indulged to uphold the rulings of subordinate courts of general jurisdiction, those who complain of their rulings being required to make affirmative proof of the facts necessary to support an assignment of error, instead of invoking a presumption. State v. Baty, 166 Mo. 561; St. Louis v. Lanigan, 97 Mo. 175; State v. Mackin, 51 Mo. App. (K. C.) 299; State v. Brown, 75 Mo. 317; McClanahan v. West, 100 Mo. 309; Hamer v. Cook, 118 Mo. 476; State ex rel. v. Bank, 120 Mo. 161.

(b) Appellants applied to this court for a writ of certiorari to the clerk of the St. Louis Circuit Court, directing said clerk to make the record show that the appeal from the justice of the peace was taken during the October term, and on that application a writ was ordered directing the clerk to show the circuit court was in session on the thirtieth day of November, when the justice's transcript was filed in his office, if that was the fact.

On our ordering the writ of certorari, the respondent admitted the fact directed to be shown by the clerk in the record; but contested the issuance of the writ on the ground that such amendment was improper; and appellants now say that on that showing it is apparent the October term was still in progress on the eighteenth day of October.

It is made the duty of an appellant from a judgment of a justice of the peace in a forcible entry or unlawful detainer action to cause to be filed in the *office of the clerk of the circuit court* to which the appeal is taken,

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on or before the return day of the appeal, a certified transcript of the record and proceedings before the justice. R. S. 1899, sec. 3381. The filing entry is not an act of the court, nor does the statute require the clerk to note that the transcript is filed in term time or vacation, as the case may be, which fact, therefore, can only become a matter of record by being introduced in evidence on the trial, although the trial judge may take notice of it, as said. But a clerk should not certify in a transcript matters judicially noticed, nor any matter which is neither properly of record *per se,* nor made of record by being put in proof and preserved in a bill of exceptions. It was the duty of the appellants to have introduced proof that the October term was still running when they appealed from the justice's decision, if they wished to bring that fact up for our consideration, and then it could properly have been inserted in the bill of exceptions. But to permit the clerk's amendment, or the admission of the respondent in lieu thereof, to overcome the presumption that the court below rightly took jurisdiction of the cause, would be to dispense with evidence to rebut a legal presumption.

It follows that we must proceed on the theory that the court below had jurisdiction.

2. The judgment against appellant's surety on the appeal bond was unauthorized; for in this kind of proceeding, a summary judgment against such sureties is without statutory warrant, the remedy of the appellee being by an action on the bond, as in the case of an appeal to the Supreme Court (Keary v. Baker, 33 Mo. 603; Gann v. Sinclair, 52 Mo. 327; Powell v. Camp, 60 Mo. 569). But the judgment may be treated as a nullity or reversed here as against the surety, without disturbing it as to the appellants. Smith v. Railway, 53 Mo. 338; Neenan v. St. Joseph, 126 Mo. 89; St. Louis v. Lanigan, 97 Mo. 175. In the case of Christopher & Simpson Architectural Iron & Foundry Co. v. Kelly et al., 91 Mo. App. (St. L.) 93, we examined the decisions touching the doctrine of the entirety of judgments and

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its effect when a judgment is rightly entered against one party and wrongly against another, and held that as the law now stands, a reversal as to both is unnecessary except in cases where the obligations of said parties are so interwoven that to annul the judgment as to one involves its annulment as to the other for the sake of justice.

Besides, this point was not presented in the appellants' motion for a new trial, which is another good reason for disregarding it. State ex rel. v. Farmers Bank, 144 Mo. 381.

3. The stipulation in the lease that if the leasehold premises should be sold during the term, the lessees would vacate and deliver up possession on thirty days' notice in writing, shows on its face that it was intended to pass with the reversion; for the purpose of it was to give the lessor the privilege of conveying the property with its enjoyment undiminished by an outstanding term, so that a purchaser might enter into possession immediately to make such use of the premises as he desired. Appellants insist that this covenant was one which did not run with the reversion, but was personal to the original lessor and could only be availed of by him and not by grantees.

According to the accepted opinion, no covenants ran with the reversion at common law, because of feudal reasons connected with fealty, or the personal tie created from choice between a lord and vassal; which relationship the former could not transfer to another without the latter's consent. When the importance of this social theory had waned in popular estimation as compared to that of the free exchange of property, legislation was desired to enable demised lands to be transferred so as to carry to grantees the full benefit and burden of contracts between owners and occupants; in other words, to authorize their conveyance subject to all rights and interests affecting their use. To satisfy this need, the statute of 32 Hen. VIII, c. 34, was enacted; a statute broad enough in its terms to carry every stipulation in a lease to a grantee of the fee, but con-

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strued for centuries to carry only those which by the common law ran with the land. Spencer's case, 5 Co. 18; Webb v. Russell, 3 Tr. 402; Dolph v. White, 12 N. Y. loc. cit. 302.

That statute is in force in this State, and, hence, whether the covenant in question passed to the present plaintiffs depends on whether it was real or personal.

Covenants are usually tested by the various resolutions in Spencer's case, and mostly by the first two, to determine their quality. Of these, the first relates to covenants which run with the land and declares that they are such as provide for acts to be done on the premises demised; though whether an assignment of either the reversion or the term transfers their benefits and obligations is therein said to depend on the circumstance whether they relate to a thing *in esse,* parcel of the demise at the time it was made (as to repair a house then on the premises) or to something to be made thereafter (as to build a wall) and that in the first instance they go by assignment whether assigns are named in the lease or not, but in the second instance only if assigns are named. But now the prevalent rule is that if an intention is shown by the instrument for them to pass, mention of assigns is not indispensable.

Personal covenants are said to be such as do not touch the interest demised, but are merely collateral to it; as a covenant to build a house on some other parcel of land not leased, or to pay a collateral sum to the lessor or a stranger; in which cases the covenants do not go to assigns even if they are named in the lease. 1 Taylor on Landlord and Tenant (8 Ed.), secs. 260, 263.

The language of the resolutions in Spencer's case might convey the impression that real covenants are only such as relate to some physical thing to be made or done on the premises; but the meaning is that they are such as affect the use and enjoyment of the premises by the tenant or the inheritance by the reversioner. Many cases have held that the covenant for quiet enjoyment, and similar provisions in deeds, which do not

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contemplate any change in the physical condition of the premises, go with the land. Norman v. Wells, 17 Wend. 136.

As was said in Bally v. Wells, 3 Wils. (S. C.) 25, in treating of collateral covenants:

"The reason why the assignees, though named are not bound, is because the thing covenanted to be done has not the least reference to the thing demised. It is a substantive, independent agreement, not *quodam modo,* but *nullo modo,* annexed or appurtenant to the thing leased."

The sum of the recondite distinctions found in the books, may, perhaps, be safely stated to amount to this: Covenants which affect the use, value and enjoyment of the premises, whether they relate to physical changes to be made thereon, or the use of the term or of the fee, go with both the reversion and the land; while stipulations in leases by which the parties to those instruments bind themselves to do acts which in no way affect the use or enjoyment of the premises, are merely personal obligations between themselves.

The covenant in question manifestly bore directly on the disposition of the premises by the owner of the fee, and, therefore, was one which ran with the land, unless the fact that assigns were not named in the lease as possible beneficiaries of the covenant restricted its benefits to the original lessor. But the rule in regard to assigns being named, simply means that it must be apparent, in instances where the covenant sought to be enforced relates to something not *in esse,* that the intention of the parties to the lease was that a subsequent assignee should enjoy the covenant; and if that intention can be gathered, although assigns are not mentioned, it will be enforced as much as if they were. In fact, that distinction as stated in Spencer's case, has been strongly criticised in England (Minshull v. Oakes, 2 H. & N. 793; 1 Smith's Lead. Cas. (9 Ed.), p. 186) and treated as of no importance in this country when the instruments construed show an intention for the covenant to run. 1 Smith's Lead. Cas. 208; Masury v. South-

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worth, 9 Ohio St. 340; Bradford Oil Co. v. Blair, 116 Penn. St. 83; Bailey v. Richardson, 66 Col. 416; Dorsey v. Railway, 58 Ill. 65.

In construing a similar covenant in a lease by which either of the parties, or their executors or administrators, might terminate it by giving twelve months notice, Lord Ellenborough held that the notice could be given by an assignee of either party or by the heir or devisee, as well as by the parties themselves, their executors or administrators, saying:

"The object of such a proviso manifestly is, that the inheritance should not be bound on the one hand against the will of the person to whom the inheritance belongs; and that, on the other hand, the lessee and those claiming under him should not be bound against their will; but that in all circumstances the parties interested, whosoever they might be, should have the power to give the necessary notice for this purpose. The intention is not to give a collateral power to be exercised by a stranger, but to annex certain privileges to the term and to the reversion to pass with such term and such reversion respectively, and to be exercised by the persons, whoever they might be, to whom such term or reversion should come." Roe v. Hayley, 12 East. 464; see, also, Kennedy et al. v. Liddy et al., 15 W. R. 431; Attol v. Hennings, 2 Bulst. 282; Wright v. Burrowes, 4 Dowl. & L. 449.

In Roberts v. McPherson, 62 N. J. L. 165, a written lease reserved the right to the lessor to terminate the tenancy at the end of any month by giving notice to the tenant, and the reversion having been conveyed, the grantee thereof gave notice to terminate. His right to do so was challenged by the tenant; but it was ruled that the statute 32 Hen. VIII, c. 34, carried the benefit of the covenant to the grantee.

We are cited by appellants to the case of McClintock v. Lovelace, 5 Penn. B. R. 417, as holding a different doctrine; but the stipulation construed therein was different from the one before us and not so obviously intended for the benefit of whomsoever might acquire

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the reversion; nor is the reasoning in that case as satisfactory as in the others we have noticed.

By the weight of authority, we think there is no doubt this particular covenant enured to the benefit of the first grantee and also of subsequent grantees; for in the seventh resolution of Spencer's case it was resolved that the assignee of the assignee should have an action of covenant.

4. The argument that the stipulation of the parties as to the damages done to the premises by appellants after they should have vacated, restricted the judgment that might be given for damages to one dollar, is unsound. That agreement also stated the monthly rental value of the premises and the court rightly gave judgment for twice the sum of the rental value to the date of judgment as damages in addition to whatever damage had been done to the property. R. S. 1899, sec. 3340.

The judgment is affirmed as to appellants. *Bland, P. J.*, and *Barclay, J.*, concur.

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99	*635

C. BRENT CARR, Respondent, v. JOHN A. UBSDELL, Appellant.

St. Louis Court of Appeals, December 16, 1902.

1. **Peremptory Instruction, When Given:** PRACTICE, TRIAL. Where there is testimony tending to prove plaintiff's case, by direct proof or by reasonable inference, it is not proper to give a peremptory instruction or declaration of law to find for defendant.

2. **Weight of Evidence:** PRACTICE, APPELLATE. It is not the proper province of an appellate court, in reviewing the record in an ordinary action at law for the recovery of money, to pass upon the weight of evidence.

3. **Agent:** CAN NOT ACT FOR TWO MASTERS: EXCEPTIONS. The exceptions to the general rule that an agent may not act for two masters in the same transactions, rest upon ground outside of the true province of the rule itself and are sustained because its underlying precept of good faith has not been violated.

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Appeal from St. Louis City Circuit Court.—*Hon. John A. Talty,* Judge.

AFFIRMED.

Frank E. Richey for appellant.

(1) The plaintiff was the agent of Dodd but sues to recover for services rendered in the transaction to Ubsdell. The case is therefore one of double agency, and the contract upon which it was based is wholly void. Chapman v. Currie, 51 Mo. App. 40; DeSteiger v. Hollington, 17 Mo. App. 382. (2) The plaintiff could not act as the agent of Dodd, and at the same time and in the same matter act as the agent of the defendant who was the opposite party in the transaction and whose interests were in direct conflict with those of Dodd, unless the plaintiff's double agency was known, not to one but to both parties, and acquiesced in by each, with a full knowledge of the plaintiff's true position. Chapman v. Currie, 57 Mo. App. 40; DeSteiger v. Hollington, 17 Mo. App. 382; Alexander v. N. W. C. University, 57 Ind. 466; Pugsley v. Murray, 4 E. D. Smith 245.

H. A. & H. H. Haeussler for respondent.

(1) There was no double agency and no claim of any in court below. By instruction No. 1 it was conceded that if evidence showed that respondent was the agent of Dodd, he could not recover. By giving judgment the court held it did not so believe. Crone v. Trust Co., 85 Mo. App. 601, is directly in point. (2) The defense below was, as will be seen by answer and instruction, that respondent was Dodd's agent and not appellant's. Trial court found he was not Dodd's agent, and this court will not, in an action at law, weigh the evidence. Double agency was not an issue. Sweitzer v. Banking Co., 76 Mo. App. 1; Riffe v. Railroad, 72 Mo. App. 222.

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BARCLAY, J.—This is an action by the plaintiff, a real estate agent, to recover "commissions" for effecting a lease of certain real property for a term of ninety-nine years to Mr. Samuel M. Dodd. The property is that on which stands houses Nos. 412, 414, 416, on Washington avenue, in St. Louis. It belonged to defendant. According to plaintiff's petition it was leased by defendant to Mr. Dodd through the agency of plaintiff at a rental of four per cent net, on a valuation of $125,000.

The answer admits the making of the lease as described, but "charges the fact to be that the plaintiff, in the matter of procuring the leasing of the property mentioned in the plaintiff's petition to Samuel M. Dodd, was at all times the agent of the said Samuel M. Dodd and acting in his interest and on his behalf, and for his said services as such agent, the plaintiff was paid by the said Samuel M. Dodd."

The reply of plaintiff denied the new matter. There was a trial by Judge Talty (a jury having been waived). At the close of the testimony the court refused a binding declaration of law in favor of defendant and gave the following declarations at his request, viz:

"1. The court declares as a matter of law that if the court, sitting as a jury, finds from the evidence that the plaintiff in the lease transaction set up in his petition, was in fact the agent for S. M. Dodd, and represented and acted for said Dodd, in negotiating or procuring the said lease, the plaintiff can not recover.

"2. The court declares as a matter of law, that if the court, sitting as a jury, finds from the evidence that neither the defendant nor his agent requested the plaintiff to render any of the services alleged in the plaintiff's petition, to have been performed by the plaintiff, and that the defendant through his agent, W. L. Wright, informed the plaintiff that the defendant would not pay the plaintiff for any such services, and would not pay a commission for procuring a leasing of the property mentioned in the plaintiff's petition, and that plain-

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tiff thereafter acted in the procurement of the said lease as the agent for S. M. Dodd, the plaintiff can not recover.''

No declarations were asked or given for plaintiff.

Then the court found for plaintiff in the sum of $3,125, and interest, total $3,192.70; and there was judgment accordingly from which defendant appealed after the ordinary formalities.

There was abundant evidence to support the amount of the recovery, if plaintiff was entitled to recover at all. Several real estate agents testified without objection that the customary commission in St. Louis for effecting a lease for a term of ninety-nine years was two and one-half per cent on the value of the leased property.

The defense was that plaintiff was in fact the agent for Mr. Dodd.

The defendant appears to have been a non-resident of this State during the dealings out of which this case arose. He had a friend, Mr. Wm. L. Wright, who acted for him in St. Louis, and through whom some of the negotiations leading to the consummation of the lease were conducted.

The plaintiff's version of the matter is that, about two years before the lease was consummated, he interviewed Mr. Wright at the request of Mr. Dodd to see whether the owner would sell the property in question. Plaintiff then introduced defendant to Mr. Dodd and some negotiations ensued, but no agreement was reached. That "deal" fell through and was abandoned. Later, in February, 1901, according to plaintiff's testimony, he saw Mr. Wright and told him he thought he could negotiate a lease of the property. Mr. Wright assented, and told him that, as they had had trouble before, to get a written proposition from Mr. Dodd, also to tell him (Wright) what his (plaintiff's) commission would be "in black and white." Following this interview plaintiff went to Mr. Dodd and obtained from him the following proposition in writing:

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"Feb. 5, 1901.

"Mr. Wm. L. Wright,

"Agt. and Mgr. of Mr. Ubsdell.

"Dear Sir: I hereby make you the following offer for a 99-year lease from March 1st, for Mr. Ubsdell's property, 45 feet on the south side of Washington ave. by a depth of 75 feet in City Block No. 97, of $5,000 per year, net, to Mr. Ubsdell, I to pay all taxes and insure the building for his benefit, in the sum of $15,000, and I to rebuild and alter the present buildings that are now on the property to conform to the building next west and south of the present building, as soon as the present leases on this property have expired, and can be rebuilt.

"Yours truly,

"S. M. Dodd."

At the same time plaintiff submitted his own statement as to commissions as follows:

"St. Louis, Feb'y 5, 1901.

"Mr. W. L. Wright.

"Dear Sir: If Mr. Ubsdell accepts Mr. Dodd's proposition and offer for a 99-year lease on his 45 feet on Washington ave. my commission will be 2½ per cent on the value placed on the property of $125,000.

"Yours truly,

"C. Bent Carr."

Mr. Wright on receiving these statements "in black and white" communicated with defendant and the lease was concluded as proposed, but plaintiff's commissions were not paid and hence this suit.

Plaintiff admitted that after the matter was closed he went to see Mr. Dodd and he tendered to plaintiff a check for $250 for his "services in this matter," as Mr. Dodd expressed it. Plaintiff demurred to accepting it on the ground that he was going to get his commission from Mr. Ubsdell, but plaintiff finally accepted the check and cashed it "with that understanding." It appeared also by the testimony of Mr. Dodd that there was no agreement between him and plaintiff that

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the latter was to receive any compensation from him (Mr. Dodd).

The foregoing is the substance of plaintiff's case on which the court refused a peremptory declaration of law for a finding in favor of defendant.

On the part of defendant there was testimony conducing to show that plaintiff was acting in the transaction at the request of Mr. Dodd, and otherwise contradicting some material features of plaintiff's evidence. But as the learned trial judge found that plaintiff was not the agent of Mr. Dodd (the main fact of the defense submitted in defendant's first declaration of law), it is not necessary to recite at length the features of conflict in the testimony on that point.

At the close of the case the court found for plaintiff and entered judgment as already stated.

1. There was a conflict of testimony on the issue of defense raised by the answer, namely, whether or not plaintiff was the agent for Mr. Dodd. There was evidence to show that he was not, and that he was acting exclusively for defendant. Where there is testimony tending to prove plaintiff's case, by direct proof or by reasonable inference, it is not proper to give a peremptory instruction or declaration of law to find for defendant. This rule is as applicable to trials by the court, sitting as a jury, as to trials with the aid of a jury. It is not the proper province of an appellate court, in reviewing the record in an ordinary action at law for the recovery of money, to pass upon the weight of evidence.

2. It is undoubted law that a principal has a right to perfect good faith on the part of his agent in respect of the matter confided to him for action on behalf of the principal. It has been declared as a maxim of morality that "no servant can serve two masters" (S. Luke, 16; 13); and the reason thereof, given in the context, is the same as that which modern law assigns for the familiar rule in the law of agency which defendant invokes. Chapman v. Currie, 51 Mo. App. (St. L.) 40; Atlee v. Fink, 75 Mo. 100; Leathers v.

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Canfield, 117 Mich. 277; (45 L. R. A. 33); Wadsworth v. Adams, 138 U. S. 380; M'Kinley v. Williams, 74 Fed. Rep. 94.

It will not be necessary for us to attempt to define the apparent exceptions to the general rule that an agent may not act for two masters in the same transaction. Such of those so-called exceptions as are valid rest upon ground outside the true province of the rule itself and are sustained because its underlying precept of good faith has not been violated, as explained in Scribner v. Collar, 40 Mich. 375, and of which exceptions the case of Nolte v. Hulbert, 37 Ohio St. 445; and Rupp v. Sampson, 16 Gray 398, furnish illustrations.

The learned trial judge gave all the declarations of law requested by defendant except the one requiring a finding for defendant as a conclusion of law. The declarations given by the court required a finding that plaintiff was not the agent of Mr. Dodd as a fact essential to a general finding in his favor. There was testimony to sustain that finding.

No error of law has been well assigned, and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

NAUGHTON & DOLAN SLATE COMPANY, Appellant, v. DAVID NICHOLSON et al., Respondents.

St. Louis Court of Appeals, December 16, 1902.

Mechanic's Lien: CONTRACTOR. **A subcontractor was informed several months before by the contractor that they (the contractors) had had trouble with the architect, and the subcontractor knew that the work on a house had been abandoned; this was sufficient to put him upon his inquiry as to whether or not the contract with the owner had been abandoned, and the work done thereafter by the subcontractor could not be considered done under his contract with the contractors, for the purpose of determining the time of filing the lien.**

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Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz,* Judge.

AFFIRMED.

STATEMENT.

In the fall of 1894, David, William and Theodore Nicholson, a partnership doing business under the firm name of Nicholson Brothers, contracted in the name of the firm with Charles N. Stevens to construct a two-story brick residence and porch on a lot in the city of St. Louis. The title to the lot was in Phoebe Stevens. Phoebe Stevens was not a party to the contract.

The contention of appellant is that Charles Stevens in the making of the contract acted as the agent of his wife, Phoebe.

On October 4, 1894, Nicholson Brothers sublet to plaintiffs the slating of the house and porch. In January or February, 1895, Nicholson Brothers had some trouble with the architects and abandoned work on the building in the latter part of February, and dissolved the partnership by giving up the business in which they were engaged and by each member of the partnership going his own way. Afterwards Stevens contracted with Smith Brothers to finish the house, which they did.

Plaintiffs furnished the material and did all the work called for by their contract by January 27, 1895, except about three hours work on the roof of the building and the roofing of the porch. They left off work on January 27 because, as P. S. Naughton, one of the partners, testified, there were no facings around the dormer windows and the porch was not ready for roofing. This witness further testified that in March or April he passed by the house and saw that the doors and windows were boarded up. Afterwards on May 27 when he was again passing by the house he discovered that it was open and immediately went for one of his workmen and had the roof of the house completed on that day which required about three hours work. In

June following Smith Brothers notified him that the porch was ready for roofing and he went to work and roofed the porch and presented his bill to Mr. and Mrs. Stevens, after it had been approved by the architects, and Stevens gave him a check for the amount of the bill, $63.59. He also testified that the work done by his firm on May 27th and prior thereto was done under the contract with Nicholson Brothers.

Plaintiffs agreed with Nicholson Brothers to do all the slating for $450. Within four months after May 27, 1895, plaintiffs filed their mechanic's lien for $386.41 and commenced this suit to enforce the same before a justice of the peace, where it had a personal judgment against Nicholson Brothers and against defendant Stevens to enforce its mechanic's lien. From this judgment defendant Stevens alone appealed.

On a trial anew in the circuit court, at the close of plaintiff's case, the jury was instructed that plaintiffs had no lien, and judgment was given for defendants Stevens and wife. After an unsuccessful motion for a new trial plaintiffs appealed.

James M. Loring for appellant.

The husband was the agent of the wife in this case. The alleged dissolution of the firm of Nicholson Brothers could not revoke the rights of plaintiff already acquired under his contract, nor his right to complete his work. These two points have already been decided by this court in the plaster suit against the same house, adversely to the owners.

Ashley Cabell, Theodore Rassieur and *H. A. Loevy* for respondents.

(1) The Nicholson abandonment of the contract with owner Stevens and their dissolution of firm, terminated their contractual relationship with him and also terminated their contract with plaintiff. Lyon v. Railroad, 127 Mass. 101; Basham v. Toors, 51 Ark. 309;

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Henderson v. Sturgis, 1 Daly (N. Y.) 336. (2) The dissolution of the Nicholson firm broke the continuity of appellant's account with that firm in March, 1895, and lien should have been filed within four months from time of dissolution. Greenway v. Turner, 4 Md. 396; Henry v. Rice, 18 Mo. App. 514. (3) No notice of abandonment by Nicholson firm or of its breach of contracts to its sub-contractors, was necessary. Greenway v. Turner, 4 Md. 396.

BLAND, P. J.—1. In McDonnell v. Nicholson, 67 Mo. App. (St. L.) 408, a suit by a subcontractor under Nicholson Brothers to do the plastering on this same building, it was held, under substantially the same evidence as was offered by plaintiff on the trial of the case at bar to prove the agency of Charles Stevens, that the evidence was sufficient to prove such agency; hence, this question need not be discussed in this opinion.

2. The point relied on by respondents as justifying the court in taking the case from the jury is that the lien account of plaintiffs was not filed within four months after the completion of all the work done under its contract with Nicholson Brothers. In support of this contention it is insisted that the work done on May 27 to finish the roof of the house was a mere subterfuge and done for the purpose of enabling plaintiffs to file a mechanic's lien, and that at that date the contract between Nicholson Brothers and Stevens had ceased to exist.

The evidence of P. S. Naughton, uncontradicted by any witness, does not tend to show that the work done on the roof on May 27 was for the mere purpose of enabling the plaintiff to file a mechanic's lien, on the contrary it tends to show that the roof had been left in an incomplete condition; that the carpenter work on the dormer windows was in such an unfinished state that the slating around those windows could not be put on at the time the other work was done and that plaintiff had no access to the house to complete the work on the roof before the day the work was done.

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There is no evidence tending to prove that plaintiff knew or had been informed that the original contractors had entirely abandoned work on the house.

It is unquestionably the law that if on May 27 the contract between Nicholson Brothers and Stevens was not in existence, that is, that on or prior to that date it had been wholly abandoned, and plaintiff had notice of the fact, or notice of such facts as should have put it on inquiry, the work performed on that day by plaintiff was not done under its subcontract with Nicholson Brothers and will not serve to bring the last item of its account against Nicholson Brothers down to that date. Gerard B. Allen & Co. v. The Frumet Mining & Smelting Co., 73 Mo. 688; Henry v. Mahone, 23 Mo. App. (K. C.) 83; Kearney v. Wurdeman, 33 Mo. App. (St. L.) 447; Henry v. Rice, 18 Mo. App. (K. C.) l. c. 514; Lyon v. Railroad, 127 Mass. 101; Badger Lumber Co. v. Knights of Pythias, 157 Mo. 366.

The evidence does not show the precise date when the new contract was made by Stevens with Smith Brothers, but it does show that Smith Brothers were at work on the building prior to May 27, the date of the last item in plaintiff's lien account. There is no evidence to show that plaintiff knew or had notice of the change in contractors. It had been informed by one of the Nicholsons several months before, that they (Nicholson Brothers) had had trouble with the architect and knew as a fact that the work had been abandoned and the house boarded up in February previous. This was sufficient to have put a prudent man on inquiry. On May 27, plaintiff may have supposed that the contract of Nicholson Brothers was still in force, but on account of the information it had, it was bound to know that it was in force in order to charge the item for work on that day in its lien account. The contract of Nicholson Brothers having been wholly abandoned prior to May 27, the item of that date can not serve to bring the lien account within the statutory period in which it might have been filed as a lien.

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We conclude that the lien account was filed out of time, and the judgment is affirmed. *Barclay* and *Goode, JJ.*, concur; the former on the ground that there was evidence to support the judgment on the theory that the lien was filed too late.

CATHERINE TAPANA, Appellant, v. JULIA SHAFFRAY, Respondent.

St. Louis Court of Appeals, December 16, 1902.

1. **Pleading and Practice:** DEFECTIVE PETITION: PRACTICE, TRIAL: STATUTORY CONSTRUCTION. Where three petitions are adjudged insufficient, it is proper for the court to enter final judgment, under section 623, Revised Statutes 1899.

2. **Equity:** FRAUD: SETTING ASIDE JUDGMENT: MISREPRESENTATIONS. Equity will vacate a judgment for fraud in the "concoction" thereof, and such a fraud may consist in preventing or debarring a party from asserting his rights in the course of a litigation by any deceitful misrepresentations whereby a defense is prevented.

3. **Defect of Parties:** PRACTICE, TRIAL: PRACTICE, APPELLATE. Where no question of a defect of parties is raised in the circuit court, the question can not be raised on appeal.

4. **Practice, Trial:** ERROR. The trial court is presumed to have correctly acted, until the contrary appears. Error must be affirmatively shown.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

REVERSED.

Christian F. Schneider for appellant.

(1) Plaintiff (appellant here) contends that her petition states a cause of action, i. e., that the defendant having procured the judgment or decree under

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which she claims the property referred to in the petition by means of fraud, i. e., by false and fraudulent representations in her petition in said cause, and to the public administrator in charge of said estate, thereby preventing an active defense in said suit, and by means of false and fraudulent proof and evidence thereby worked a fraud upon the court and the administrator in charge of the estate of Ann McKenna, and this plaintiff (appellant) not having been made a party to said suit, and having no knowledge nor notice of the same, the defendant (respondent) should account to this plaintiff for her interest in the estate of said Ann McKenna, plaintiff's sister, and that she (respondent) be decreed to hold said property as trustee for plaintiff (appellant herein). 14 Am. and Eng. Ency. of Law (2 Ed.), p. 23, par. 2, says: "The clearest cases of actual fraud, and those with which courts generally have to deal, are cases in which a person had made a positive misrepresentation or misstatement as to the existence or non-existence of a particular fact. In such case, he is clearly guilty of fraud, both at law and in equity, if the representation was as to a material fact and was false; if it was of such a character that the other party had a right to rely upon it; if it was accompanied by knowledge that it was false, or what the law regards as equivalent to actual knowledge, and by an intent to deceive; if it was relied upon by the other party, and did in fact deceive; and if he had sustained damages." Bank v. Byers, 139 Mo. 627. (2) The case at bar contains all of the elements above set forth, and comes clearly within the law as therein laid down. If so, the said petition states a good cause of action, and the defendant's demurrer should have been overruled. Paretti v. Rebenack, 81 Mo. App. 494; Edwards v. Noel, 88 Mo. App. 434. (3) A judgment may be directly assailed for fraud in obtaining it. McClanahan v. West, 100 Mo. 309; Wonderly v. Lafayette Co., 150 Mo. 635; Wells on Res Judicata, sec. 499. (4) False representations made by one of facts peculiarly within his knowledge vitiates

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any contract made in reliance of such representations. 14 Am. and Eng. Ency. of Law (2 Ed.), p. 120, par. 10; Gottschalk v. Kircher, 109 Mo. 170; Arthur v. Wheeler & Wilson Mfg. Co., 12 Mo. App. 335; Herman v. Hall, 140 Mo. 270; McBeth v. Craddock, 28 Mo. App. 380; Wonderly v. Lafayette Co., 150 Mo. 635.

Alfred P. Hebard for respondent.

(1) The judgment against the administrator of Ann McKenna in 1893 (the estate, according to the petition, consisting entirely of personalty), is binding against all persons interested in said estate, including the appellant, even though they may not have been made parties to the 1893 suit, unless some adequate reason is shown why the judgment is invalid against the administrator. Moody v. Peyton, 135 Mo. 482. (2) The carelessness or neglect of the administrator in his handling of the 1893 suit would not vitiate the judgment therein obtained, unless there was a fraudulent combination or collusion between the administrator and the plaintiff therein (and no such combination or collusion is charged in the petition). Matthis v. Town of Cameron, 62 Mo. 504.

BARCLAY, J.—In this cause plaintiff has appealed from a judgment in favor of defendant following an order sustaining a demurrer to her third amended petition.

In order that the plaintiff's case may fully appear, we set forth the petition (omitting caption and signature) at large:

"Plaintiff, for her third amended petition in above entitled cause, leave to file same having been first had and obtained, states that plaintiff is a sister and heir at law of one Ann McKenna, deceased, hereinafter mentioned; that she is single and unmarried and the widow of one . . . Tapana, deceased.

"Plaintiff further states that said Ann McKenna departed this life intestate, on or about the first of

July, 1893, leaving as her sole heirs at law her brothers and sisters, viz., Patrick Shaffray, the husband of defendant, Julia Shaffray, Edward Shaffray, Mary Lee and plaintiff herein, Catherine Tapana.

"Plaintiff further states that the said Ann McKenna at the time of her decease was the owner and possessed of property of the value of four thousand dollars; that plaintiff herein has never received any part or portion of said property nor anything for or on account of her interest in the estate of said Ann McKenna, deceased.

"Plaintiff further states that upon the death of said Ann McKenna the said defendant, Julia Shaffray, for the purpose and with the intent of defrauding the heirs of said Ann McKenna, including plaintiff herein, and for the purpose of getting possession of the property and effects of the said Ann McKenna, and being the property hereinafter mentioned, took possession of all the moneys, property and effects formerly belonging to the said Ann McKenna, deceased, being seven hundred and fifty dollars in addition to the property hereinafter mentioned, and with said intent and purpose did thereafter, on or about the twenty-second day of August, A. D. 1893, procure the appointment of William C. Richardson as administrator of the estate of said Ann McKenna; that for the purpose and with the intent to cheat and defraud this plaintiff out of her rights, interests, and claims in and to the estate of said Ann McKenna as aforesaid, said Julia Shaffray retained possession of all the property of the said Ann McKenna, and on the twenty-third day of August, A. D. 1893, caused a petition to be filed in the circuit court of the city of St. Louis, Missouri, in which said Julia Shaffray was plaintiff and said William C. Richardson as public administrator of the city of St. Louis in charge of the estate of said Ann McKenna and Edward Shaffray, Mary Lee, and husband of plaintiff in that suit, Patrick Shaffray, were made defendants, being suit No. 93002, room 4 of said circuit court; that in the petition filed in said suit by Julia Shaffray, for

the purpose and with the intent of cheating and defrauding this plaintiff out of her rights, claims and interest in and to the estate of said Ann McKenna, falsely and fraudulently represented to this honorable court and alleged that, prior to the death of said Ann McKenna, to-wit, on March 1, 1893, the said Ann McKenna had promised and agreed with said Julia Shaffray, in consideration of the said Julia Shaffray agreeing to take care of and provide for her the remainder of her life, at her death she would give to Julia Shaffray all the property which she (Ann McKenna) might then own; that in said petition, said Julia Shaffray further falsely and fraudulently represented to this court that she, Julia Shaffray, did so provide and care for said Ann McKenna till the time of her death, July 1, A. D. 1893. All of which said Julia Shaffray then and there well knew to be false and untrue.

"That in said petition, said Julia Shaffray further alleged that she so waited upon and cared for said Ann McKenna without any charge to said Ann McKenna; that in truth and fact said Ann McKenna paid said Julia Shaffray prior to her death for such provision and care in services and money. Plaintiff further alleged in said petition that said Julia Shaffray had in her lifetime caused a will to be prepared, giving to her, said Julia Shaffray, nearly all her property and estate, all of which allegations were false and untrue, as said Julia Shaffray then and there well knew. That thereupon said Julia Shaffray in her said petition prayed a decree vesting in her absolutely all the property and estate of said Ann McKenna.

"Plaintiff further represents that said Julia Shaffray, for the purpose of cheating and defrauding this plaintiff, failed to make this plaintiff a party to said suit, and failed to notify her of the pendency of the same.

"Plaintiff further states that, in furtherance of the said scheme of the said Julia Shaffray to defraud this plaintiff, at the trial of said cause, by means of fraudulent and incompetent testimony, procured, pro-

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duced and given by and in behalf of said Julia Shaffray, tending to prove the allegations of said petition, procured a judgment or decree in said cause, on the fifth day of December, A. D. 1893, awarding to her, said Julia Shaffray, all the property, effects and estate of the said Ann McKenna, deceased; that among the said property was the following:

"Nine hundred and thirty-four dollars and ninety cents cash; note of J. T. Donovan Real Estate Company for $400, dated June 26, 1893, due one year from said date; also note for $1,600, dated June 4, 1890, due three years after said date and extended for three years from said date, and being a principal note; and six interest notes for $48 each, dated said fourth day of June, 1893, and payable respectively six, twelve, eighteen, twenty-four, thirty and thirty-six months after said last-named date; and deed of trust conveying to the trustee of said Ann McKenna a tract of ground with improvements thereon, fronting twenty-four feet on the east line of Pleasant street, and being the north six feet of lot 10, and the south eighteen feet of lot 11, of city block No. 1945 of the city of St. Louis, Missouri; said deed of trust being of record in book 959, page 352, of the office of the recorder of deeds for the city of St. Louis, Missouri.

"That in pursuance of said decree and judgment the said Julia Shaffray obtained possession of the property above described from said William C. Richardson and did thereafter, in pursuance of her said purpose to cheat and defraud this plaintiff, cause said real estate hereinabove described to be sold under the said deed of trust, and did, on the twenty-fifth day of August, A. D. 1899, purchase said real estate at such sale with the money and property belonging to the estate of Ann McKenna, and fraudulently obtained by the said Julia Shaffray, as herein set forth, said trustee's deed being of record in book 1519, page 405, of the office of the recorder of deeds for the city of St. Louis, Missouri, and now claims to be the sole and absolute owner of all the said property and the estate

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formerly belonging to the estate of the said Ann McKenna.

"Plaintiff further states that the said Julia Shaffray for the purpose of obtaining said judgment and decree in said cause and for the purpose of avoiding a contest in said case after the institution of said suit, and on the day of said trial, compromised with and paid Mary Lee the sum of $500, one of the defendants in said suit and an heir of said Ann McKenna, as aforesaid, and thereby caused said Mary Lee not to make a defense in said suit; and failed to notify Edward Shaffray, one of the defendants in said suit, of the pendency of the same, although she well knew his place of address and abode in the State of Louisiana, and well knew that said Edward Shaffray was not in the State of Missouri at said suit and that he knew nothing of the pendency of said suit. That in furtherance of her said scheme to cheat and defraud this plaintiff, said Julia Shaffray caused her husband, the only other defendant in said cause to default and caused said William C. Richardson, administrator as aforesaid, to not make an active defense in the said suit by means of the false and fraudulent representations alleged herein to have been made by said Julia Shaffray; that for that purpose said Julia Shaffray falsely and fraudulently represented to said Richardson that there were no other heirs than those mentioned as defendants in said suit of Ann McKenna; and that said Ann McKenna had made and entered into the agreement alleged in said petition in the said suit and that all the heirs were willing and consented that the said Julia Shaffray should obtain the judgment and decree prayed for in the said petition and hereinbefore set forth; that said Richardson relied upon such false representations and failed to make any further investigations; that if he had made any further investigations he would have learned that said representations made by said Julia Shaffray were false and untrue; and that said Richardson thereupon failed and neglected to procure witnesses to disprove the allegations made in the petition in said suit and

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to defeat said action; that upon investigation he could easily have procured witnesses to disprove the allegations in said petition contained; that at the trial of said cause Julia Shaffray represented to the court, through her attorneys, that said suit had been compromised and that said Richardson was satisfied and all defendants had consented that said plaintiff obtain the said decree; that said Richardson was present in court by attorney at the time and consented thereto; that said Richardson's attorney failed to cross-examine the witnesses produced, the witnesses introduced at said trial, and failed to ask them the names of the heirs of said Ann McKenna; that upon a cross-examination of said witnesses, and if plaintiff's witnesses had been interrogated it would have appeared that plaintiff herein, Catherine Tapana, was an heir of said Ann McKenna, and that the allegations contained in the petition in said cause were untrue; that by reason of the premises a fraud was worked upon the court and said decree obtained thereby.

"Plaintiff further states that she is not a party to said suit and had no knowledge of the pendency of the same, nor of the said alleged fraudulent claim of the said Julia Shaffray; that she had no knowledge of said fraudulent acts and claims of said Julia Shaffray until she came to the city of St. Louis, Missouri, in the year A. D. 1900; that she did not even know of the decease of said Ann McKenna until about the year A. D. 1900. Plaintiff further states, that said Julia Shaffray, for the purpose of cheating and defrauding this plaintiff out of her rights in and interests to the said property and estate of said Ann McKenna, falsely represented to the other heirs of the said Ann McKenna that this plaintiff was deceased:

"Wherefore, plaintiff prays this court to order and decree that defendant account to plaintiff for her interest as an heir in and to the estate of said Ann McKenna and in and to the property described herein; that this honorable court decree that said Julia Shaffray holds said property as a trustee for plaintiff herein,

and that, for such claim and interest in and to said real estate and estate of said Ann McKenna, plaintiff have a lien and interest in and to said real estate and property, or so much thereof as may be in plaintiff's possession, and for such other and further orders, judgments and decree as to the court may seem meet and proper in the premises."

The demurrer is general and assigns as the sole ground that the said petition does not state facts sufficient to constitute a cause of action.

The court sustained said demurrer and plaintiff appealed.

1. The final judgment in favor of defendant in the trial court, after sustaining the demurrer to the third amended petition, was in accordance with our statute on the subject. R. S. 1899, sec. 623. In the absence of any different showing we assume that at least two prior petitions had been adjudged insufficient in the manner described in that section; for we are bound to assume, that the trial court correctly acted, until a different state of facts is developed. State ex rel. v. Pohlman, 60 Mo. App. (St. L.) 444. Error must be affirmatively indicated. So we must inquire whether the ruling on the last demurrer was correct.

2. The proposition invoked by defendant, namely, that fraud for which equity will vacate a judgment must be some fraud in the very "concoction" thereof, and not merely in the substance of the case on which the judgment was pronounced, is sustained by several precedents in this State. Moody v. Peyton, 135 Mo. 482; Fears v. Riley, 148 Mo. 49.

Yet, on the other hand, a fraud by which a party, or one interested in a litigation, is prevented or debarred from asserting his rights therein, in such a way as to suffer injury, is remediable, according to our home authorities. Wonderly v. Lafayette County, 150 Mo. 635; Smoot v. Judd, 161 Mo. 673.

We consider that the allegations of this petition bring plaintiff's case within the last class mentioned. The alleged deceitful misrepresentations to the ad-

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ministrator, whereby he was induced to make no defense in the former suit, are fully set forth in the petition, and they constitute a fraud against which equity will give relief. That fraud is of the sort which can not escape investigation on account of the judgment of a court which it induced. The administrator was misled into making no defense by the fraudulent misrepresentations alleged, and that amounted to fraud in the "concoction" of the judgment within the meaning of the aforesaid Missouri decisions on that subject.

3. It is not necessary to inquire whether all the proper parties are before the court, as no such question was raised in the circuit court. R. S. 1899, sec. 864. The demurrer does not proceed upon any defect of parties, and any such objection was waived by failure to make it in the trial court. R. S. 1899, sec. 602.

We are of opinion that the last petition of plaintiff states a case for equitable relief. The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

E. U. HUGUMIN & CO., Respondent, v. GEORGE H. HINDS and OTTO WEISSGERBER, Appellants.

St. Louis Court of Appeals, December 23, 1902.

1. **Bills and Notes**: TRANSFER: INDORSEMENT: EVIDENCE: PLEADING AND PRACTICE: ERROR. In an action by an indorsee on a negotiable promissory note, where it was denied that plaintiff was a bona fide purchaser for value, the admission of the indorsement of the payee in evidence without proof of its authenticity, over defendant's objection, was error.

2. ——: ——: ——: WAIVER OF PROOF: INDORSEMENT. An admission of the execution of a negotiable note in an action by the indorsee does not constitute a waiver of proof of the indorsement.

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3. ——: ——: ——: ACTION: NEGOTIABLE NOTE: INDORSEE: INNOCENT HOLDER: EVIDENCE: JURY: PRACTICE, TRIAL. Where, in an action on a negotiable note for $150 by an indorsee, it was denied that the plaintiff was an innocent holder for value, and plaintiff as part of his case, testified to his purchase of the paper, and that he had paid $100 therefor, during the month of January, 1899, by a check on a certain trust company, and made no previous inquiry as to defendant's standing, and had no talk or understanding with the payee as to the collection of the note, the question of the credibility of his evidence as to the indorsement of the note to him was for the jury.

ON REHEARING.

4. **Record**: BILL OF EXCEPTIONS: TIME OF FILING BILL OF EXCEPTIONS: PRACTICE, TRIAL. Where a statement of the circuit clerk, setting forth the record on an appeal, recited that "on the seventeenth day of April, 1901, defendants filed their bill of exceptions in this cause," after which followed the bill of exceptions, and at the close of the transcript the clerk certified that the foregoing was a true and complete copy of the judgment, motion for a new trial, affidavit for appeal, and "all orders and motions affecting the same, in the case," the record contained a sufficient showing of the filing of the bill of exceptions.

5. ——: ——: PRACTICE, APPELLATE: PRESUMPTIONS: ADJOURNMENT OF COURT. Where nothing in the record intimated that the court adjourned for the term before the bill of exceptions was filed, the appellate court will not presume an adjournment in the absence of any such showing.

6. ——: ——: MOTION FOR NEW TRIAL: CONTINUANCE: PRACTICE, TRIAL: PRACTICE, APPELLATE. The rule is that a continuance of a motion for a new trial will be presumed in support of the regularity of the trial court's action in the premises.

Appeal from Laclede Circuit Court.—*Hon. L. B. Woodside,* Judge.

REVERSED AND REMANDED.

I. W. Mayfield for appellant.

(1) It was the duty of the plaintiff to allege and prove three elementary facts: (a) That he was a bona fide purchaser before maturity. (b) The indorsement by the payee, and before maturity. (c) A

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consideration. (2) Under the pleadings each of these three points was a question of fact and should have been submitted to the jury. Worrell v. Roberts, 58 Mo. App. 197; Campbell v. Hoff, 129 Mo. 317; Seehorn v. Bank, 148 Mo. 256.

J. P. Nixon for respondent.

(1) This is an action commenced in the Laclede Circuit Court upon a certain promissory note as the cause of action. The note was executed by Hinds & Weissgerber, appellants, and was for the payment of money to the order of the payee therein mentioned, and expressed to be for value received, and was by its terms a statutory promissory note. R. S. 1899, sec. 457. (2) The rule, as stated by the American and English Encyclopedia of Law, is: "The general principles governing negotiable instruments, whether as maker, drawer or acceptor, are alike. So if in a note or bill there are added to the name of the payee words denoting agency or official character, such words are deemed merely descriptive, and the note or bill is payable to the individual thus described personally, and he is liable personally on the instrument." 1 Am. and Eng. Ency. Law (New Ed.), page 1047. It is to be noticed that the rule is that added words "denoting agency" are descriptive, and it is submitted that "manager" denotes agency within the meaning of the text. Illustrative cases are given: "E. Faw, agent for Marietta Paper Mill Co." Held note of Faw. Faw v. Meals, 65 Ga. 711.

BARCLAY, J.—This action was begun in July, 1899, by plaintiff against the two defendants, in the circuit court of Laclede county, Missouri. It is founded on the following instrument:

"$150.00. Lebanon, Mo., Oct. 19, 1898.

"Six months after date we, each as principal, promise to pay to the order of D. F. Hulbert, Manager Genille, of 923 Olive street, St. Louis, Mo., one hun-

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dred and fifty dollars, for value received, negotiable and payable without defalcation or discount at the Bank of Lebanon, in Lebanon, Missouri, with interest from date at the rate of eight per cent per annum until paid, and if interest be not paid annually to become as principal and bear the same rate of interest.

"HINDS AND WEISSGERBER."

The indorsements on the paper are as follows:

"D. F. Hulbert: For collection for account of E. U. Hugumin & Co."

The petition charges that defendants promised by their said note to pay said sum, as therein expressed, and that said Hulbert, before maturity thereof, for value received, assigned and delivered said note to plaintiff. Then follow allegations of demand, non-payment and protest (whereby protest fees accrued to plaintiff) and a prayer for judgment for $150, with interest and protest fees.

The answer denies the petition generally (except the execution of the note) and then charges that the only consideration for the instrument arose from these facts:

"That they executed the note sued upon to one D. F. Hulbert, as manager for one Genille, of St. Louis, Missouri, the payee of said note, and that the same was given upon the following conditions and the only consideration of said note was 'that the said Genille or his agent, D. F. Hulbert, was to furnish these defendants one thousand stamps and folders known as Genille stamps and folders, with full instructions as to their redemption,' and it was expressly stipulated by and between these defendants and the payee of said note that for and in consideration of the defendants' signing and giving said note herein sued upon, that they would keep and maintain a good and competent photographer in Lebanon, Missouri, to redeem said stamps by making and forwarding them to St. Louis, Missouri.

"Defendants further complaining, say that it was expressly understood by and between the payee of said

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note and these defendants that for and in consideration of said note herein sued upon that when said stamps were forwarded to Genille at St. Louis, Missouri, the same were to be redeemed by said Genille with suitable prints and photographs, to be furnished in their patent statuary photography, and then returned to the defendants free of any charge or expense whatever.

"Defendants state and represent that in each and every particular the payee of said note failed, refused and neglected to comply with the agreement and consideration for which said note was given; that they failed and refused to deliver a sufficient number of folders for said stamps, as agreed and expressly stipulated as a part of the consideration of the note herein sued on.

"Defendants say that they failed, neglected and refused to establish a redemption agency in Lebanon, Missouri, as expressly stipulated and as a part of the consideration of the defendants' signing and giving said note herein sued upon.

"Defendants further say they failed, refused and neglected to make and forward to these defendants suitable prints or any prints at all or photographs, as expressly stipulated and as a part of the consideration of said note.

"Defendants in answering, further aver that said note was obtained by fraud and that the consideration of said note entirely failed, and that the same was not bona fide purchased by the plaintiff but is a conveyance by and between the payee of said note and plaintiff herein to cheat and defraud the defendants out of their just rights in the premises.

"Wherefore defendants pray to find said note void and for naught held, and that they be discharged with costs."

The cause coming on for trial before the learned circuit judge and a jury, plaintiff read the note and indorsements in evidence, despite objection by counsel for defendants on the ground that the indorsements had not been proved. Plaintiff then testified that he lived

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in St. Louis; was a pawnbroker; had known the payee, Mr. Hulbert, about eight years; saw this note about three months after it was made, when he bought it for $100 from Hulbert, whose signature to the indorsement is thereon; that he, plaintiff, was the owner.

He further stated as a witness that he and Mr. Hulbert occupied parts of the same business building; they had adjoining stores on the ground floor of 923 Olive street, St. Louis, where plaintiff had been in business about two years and Mr. Hulbert for a longer time. Plaintiff testified that he bought the note in suit with a check on the Union Trust Company; that he made no previous inquiry about the financial standing of defendants; bought no other notes of him; had had no talk with Mr. Hulbert about the pending suit; had no understanding with him about the expenses thereof; had made no demand on him to pay the note; didn't ask anything about what the note was given for; never heard of any failure of consideration of the note; had not abandoned his claim against Mr. Hulbert as indorser.

Plaintiff introduced in evidence the check for $100 which he had described as given for the note in suit.

The foregoing is an outline of the substance of the plaintiff's case.

The defendants gave testimony tending to show a failure of consideration for the note between them and the payee. It does not seem necessary to mention the particulars of it considering the view we take of the main question involved in this appeal.

At the close of the whole testimony the court gave to the jury the following instruction:

"Under the law and the evidence, the jury is instructed to find the issues for the plaintiff and assess his damage at the amount of said note, together with interest."

Whereupon the jury returned a verdict for plaintiff for $175.41 and judgment was entered thereon. Defendants appealed, observing the customary formalities.

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1. Defendants insist that the cause should have been submitted to the jury on the pleadings and the evidence.

Without going very far into the merits of the case, it is clear that the burden of proof rested on plaintiff to submit in the first instance some evidence tending to prove the fact of the indorsement. The trial court admitted in evidence the indorsement of the payee without any prior proof of its authenticity, and over the objection and exception of the defendants. The indorsement did not prove itself. Bank v. Pennington, 42 Mo. App. (K. C.) 355. Defendants admitted the execution of the note, but that admission did not waive or dispense with proof of the indorsement. Such proof was an essential part of plaintiff's case. Bank v. Donnell, 35 Mo. 373; Mayer v. Old, 51 Mo. App. (K. C.) 214. Plaintiff as a witness testified to the signature of the payee, but he was cross-examined by defendants in such a way as to indicate that the validity of the indorsement was by no means conceded as it was in Stillwell v. Patton, 108 Mo. 352. The testimony of plaintiff by his deposition tended to prove the indorsement, but it was the province of the jury (subject to the reviewing power of the trial judge) to decide, as an issue of fact, whether they believed that testimony, according to the recent rulings of the Supreme Court on the subject. Even though no conflict of testimony was developed on those points, the credibility of the plaintiff's testimony was, nevertheless, to be passed upon by the jury. Gannon v. Gas Co., 145 Mo. 502; Seehorn v. Bank, 148 Mo. 256. For the court to declare that the jury are bound, as a matter of law, to believe the testimony of plaintiff, irrespective of their opinion of its truth, would be for the court to invade the domain of the triers of the facts. Bryan v. Wear, 4 Mo. 106; Garesche v. Boyce, 8 Mo. 228; Steamboat Memphis v. Matthews, 28 Mo. 248; Gregory v. Chambers, 78 Mo. 294; Wolff v. Campbell, 110 Mo. 114; Mineral Land Co. v. Ross, 135 Mo. 101. Yet that was precisely the effect of the binding instruction to find for the plaintiff in the case at bar.

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2. Plaintiff claims that the construction of the written contract contained in the note was a question for the court. That claim is correct in so far as it expresses a general rule. It is needless now to mark its limitations or the exceptions engrafted upon it. Beyond the construction of the instrument and the question of identity of the indorsement with the name of the payee lay the issue whether or not plaintiff had acquired the note by indorsement. It was a negotiable note. R. S. 1899, sec. 457. Plaintiff's possession of the note, with due proof of the indorsement, was prima facie evidence that he was an innocent holder for value. Borgess Investment Co. v. Vette, 142 Mo. 560; New Albany Mills v. Meyers, 43 Mo. App. (K. C.) 124; Eyermann v. Piron, 151 Mo. 116. The note itself imports a consideration besides reciting one. R. S. 1899, sec. 894. Yet plaintiff, without any occasion to do so and not relying on the inference that the transfer to him was for value, proceeded in chief to put in his own testimony of the facts of his purchase of the paper, showing that he had paid $100 for it toward the end of January, 1899, without any inquiry about defendants, etc. Having gone into that question himself, the credibility of his evidence of the indorsement to him could not properly be taken from the jury and passed upon by the court as a matter of law, in the circumstances already indicated. Bruyn v. Russell, 52 Hun 17. The proof of the indorsement by the payee rested solely on the evidence of plaintiff. He was an interested party and the jury were authorized to consider his interest in the result in passing on the weight to be given to his testimony. R. S. 1899, sec. . . . It was for the jury to find the fact of indorsement which was in issue under the pleadings and on which fact plaintiff necessarily depended to make his title clear to the instrument in suit. So there was error in giving the peremptory instruction.

3. As the cause should be retried, we refrain from further comment on the effect of the testimony. The

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judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

OPINION ON REHEARING.

PER CURIAM.—This cause has been fully reconsidered on a rehearing granted at the instance of plaintiff.

1. At the second hearing plaintiff (respondent) objects to a review of the merits on the ground of alleged defects in the record touching the authentication of the bill of exceptions,

It is insisted that the record itself does not show that the bill was filed. There is this recital by the circuit clerk in his statement setting forth the record proper in this cause, viz.:

"And afterwards, to-wit, and on the seventeenth day of April, 1901, the defendants filed their bill of exceptions in this cause, which is in words and figures as follows, to-wit:

(Then follows the bill).

At the close of the transcript (for this case is here upon a full transcript) the clerk officially certifies the "foregoing" to be a true and complete copy of the judgment, motion for new trial, affidavit for appeal and "all orders and motions affecting the same" in the case (citing the title of this case).

It is true, as often held, that the record must show that the bill of exceptions was filed, independently of any recital in the bill itself. Ricketts v. Hart, 150 Mo. 64; Hughes v. Henderson, 95 Mo. App. (K. C.) 312, 68 S. W. 1069. But we consider the entry above quoted to be a sufficient showing of record of the filing of the bill.

2. It is further contended that the extension of time for ninety days to file the bill of exceptions does not appear by the record proper. The reply to this is that the record does not show that when the bill was filed the term at which the motion for new trial was overruled and the appeal was taken had expired. The record

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already quoted discloses that the bill was filed, April 17, 1901. It also shows that the motion for new trial was overruled, February 6, 1901, and that the appeal was taken and allowed, February 10, 1901. Nothing in the record intimates that the court adjourned for the term before the bill of exceptions was filed, and we can not properly presume an adjournment in the absence of any such showing.

3. It is next contended that no order of continuance of the motion for new trial appears to carry it over from the term when it was filed to that when it was overruled. It was formerly held that such an order of continuance was necessary, but that ruling was disapproved by the Supreme Court on appeal in the same case. The rule is that the continuance will be presumed in support of the regularity of the trial court's action in the premises. Givens v. Van Studdiford, 13 Mo. App. (St. L.) 168, and 86 Mo. 149.

4. On the merits of the appeal, the opinion heretofore filed has been modified in some respects and as modified is confirmed and adopted as the opinion of the court. We do not consider that the general principle declared in the Gannon case, 145 Mo. 502, has been discarded or overruled by the Supreme Court, but on the contrary we believe that court adheres to the proposition that it was for the jury to pass upon the credibility of oral testimony on a disputed issue of fact even when the testimony is not contradicted. That ruling has been repeatedly followed in the appellate courts, and we do not find any decision which can properly be held to overrule it. Hester v. Casualty Co., 78 Mo. App. (K. C.) 511; Overstreet v. Moser, 88 Mo. App. (St. L.) 80; Lesieur v. Zimmerman, 88 Mo. App. (St. L.) 664; Ellis v. Railway, 89 Mo. App. (St. L.) 241; Ward v. Steffen, 88 Mo. App. (St. L.) 576.

The judgment is reversed and the cause remanded for new trial, all the judges concurring:

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HENRY D. PATEE, Respondent, v. McCABE-BIERMAN WAGON COMPANY, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Instruction:** EVIDENCE: ERROR: PRACTICE, TRIAL. An instruction is erroneous which is not based on evidence.

2. **Special Damages:** CLAIM: PETITION: PROOF: PLEADING AND PRACTICE. A claim for special damages, such as in the incurring of expense to recover property taken, must be specifically assigned in the petition, in order that the defendant may be reasonably advised of the case he is called upon to meet.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

REVERSED AND REMANDED.

James K. Hansbrough for appellant.

Evidence of value of time employed by respondent, in recovering the property, over appellant's objection, was improperly admitted; because, no such damages were claimed in the petition. That special damages, such as this testimony tended to show, must be specially alleged, is well-settled law in this State, at least. O'Leary v. Rowan, 31 Mo. 117; State v. Blackman, 51 Mo. 319; Mellor v. Railway, 105 Mo. 463; Coontz v. Railway, 115 Mo. 674; Slaughter v. Railroad, 116 Mo. 274; Bristol Mfg. Co. v. Gridley, 28 Conn. 201.

Geo. E. Egger for respondent.

(1) There was no error committed by the court in overruling appellant's objection to evidence offered by respondent relative to the time lost by respondent (and its value) in hunting for and recovering his goods. Brown v. Railroad, 99 Mo. 310; Gerdes v. Christopher,

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124 Mo. 347; Kupperschmidt v. Electric Co., 70 Mo. App. 445; Palmer v. Railway, 80 N. W. Rep. (Minn.) 869; Golden v. Clinton, 54 Mo. App. 100; Mitchell v. Bradstreet, 116 Mo. 226. (2) Where the instructions in this case taken as a whole, properly present it to the jury, the fact that one of them, standing alone, would be misleading, will not cause a reversal of the judgment. Deweese v. Railway, 54 Mo. App. 476; Sullivan v. Railway, 88 Mo. 169; Owens v. Railway, 95 Mo. 169; Shaw v. Dairy Co., 56 Mo. App. 521; Hughes v. Railroad, 127 Mo. 447.

BARCLAY, J.—Plaintiff sues defendant for the wrongful taking, detention and injuring his property, claiming $500 actual damages and $1,000 punitive or exemplary damages.

The substance of the petition is that defendant, March 6, 1899, took and carried away certain goods and chattels of defendant, described as follows: One piano, one printing press and a lot of type and printing materials, two gasoline "Beacon burner" lamps, three trunks containing personal effects, one desk, chairs and other personal property of the value of six hundred dollars.

Plaintiff charges that defendant retained two lamps of the value of thirty dollars, injured the other property and put plaintiff to "considerable trouble" to recover the same.

The answer was a general denial.

The case was tried with the aid of a jury.

The facts as developed in evidence on behalf of plaintiff are that all the goods referred to in the petition were returned to plaintiff by defendant except two "Beacon burner" lamps. Defendant had a chattel mortgage upon a large wagon belonging to plaintiff to secure a loan which matured five or six months before the taking of these goods. The wagon was large and very heavy; about fourteen feet in length, six feet wide, with curtains drawn down on the sides and back, at the time of taking.

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Plaintiff had stored the wagon in a stable in the city of St. Louis in charge of a colored man. The stable was not at or near the residence of the plaintiff. It was simply a place which plaintiff had engaged for the storing of the wagon and contents. It appears that, about March 6, 1899, some of the officers of defendant came to the stable, effected an entrance and hauled the wagon away to the factory of defendant. When plaintiff discovered that fact, which he did March 6, 1899, he demanded the goods of defendant; whereupon they took them out of the wagon and returned them to the stable, everything except the two lamps. The value of the lamps was given in evidence as $30.

According to plaintiff's account the articles were piled around promiscuously on their return and were damaged, particularly the piano, desk, printing press and type.

The testimony of plaintiff tended further to show that the stable where the wagon had been placed by him was closed and no one could get in except the colored man who had it in charge.

The plaintiff concedes that defendant had the right to take possession of the wagon when it was taken. Defendant on the other hand does not claim a lien on the goods which were in the wagon.

Plaintiff complains that he was obliged to expend considerable time going about to discover where the goods were, after they had been taken by the defendant.

During the examination of plaintiff, the court ruled that it was not permissible for defendant under the pleadings to justify the taking of the goods on the ground that it had the right to take the wagon in which they were stored, or to show that they were taken by mistake, even in mitigation of damages, for want of any pleas to that effect.

The court limited the inquiry to the question of whether the defendant took the property, but afterwards ruled that defendant would be permitted to show the circumstances in which the property was taken, "as

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bearing on the question of punitive damages only, not as to the right to take the property in the wagon.''

The plaintiff gave evidence tending to prove that the property was returned to him in a damaged condition.

The colored man who had charge of the stable where the wagon was stored testified on behalf of plaintiff that the premises (which had formerly been a livery stable kept by Mr. Chilton) had been given into his care by the agent of the property after Mr. Chilton left and that in consideration of his looking after them he was allowed to keep his own wagon and horse therein. The wagon in question was in the stable when Mr. Chilton left it, and remained until the occurrences which gave rise to this action.

According to this witness, the front door of the stable was nailed up and there was ''a chain on the back door'' (the meaning of which is left to inference). The stable, however, could be entered through a large open window in the rear, and the wagon could not be taken out without breaking open the front door, which had been nailed up.

The same witness testified that the wagon and the goods therein were ''all right'' a day or two before they were taken; but when they were returned to the stable, a few days later, some of the goods were broken and badly injured.

On defendant's side there was evidence tending to prove that the goods which were taken away in the wagon were returned in good order to the same place as soon as the defendant learned the whereabouts of plaintiff; that defendant had been unable after diligent inquiry for two or three days to find plaintiff before taking the wagon, and that, when the place of storage of the wagon was discovered, no one was found in charge of the wagon, the goods or the stable. One of defendant's officers, after finding the wagon in the stable, testified that he went to a number of places where plaintiff had formerly boarded; heard nothing of him, so he had two persons meet witness early one morning

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at the stable and they pushed open the sliding front door wheeled the wagon out, hitched it behind another wagon and took it to defendant's factory.

Three days later witness received a telephone message from plaintiff asking if he had taken plaintiff's wagon, to which witness replied that they had it at the factory. Plaintiff then said: "You have maliciously taken my goods," and witness rejoined, "No, that is not true; we have taken your wagon." Witness then believed they had taken the wagon only, as the curtains were down and nobody had looked into the wagon; that the boards of the wagon were seven feet above the ground, and he had never thought of looking into the wagon. Next day after an interview with plaintiff this witness discovered the goods, announced that they had been taken by mistake, but that he place where they were was not safe and he would do with them as plaintiff might direct. Plaintiff refused to say where he wanted the goods delivered. Witness told him then that they would be sent to the same place unless they got other directions. Plaintiff left witness, and witness immediately engaged the services of the Bollman Bros. Piano Company, which returned the goods to their former place of storage, in good order. Witness testified that all the goods taken were returned and in the same condition; and that the stable was a very unsafe place for storage, as any person could get in at any time as he did.

Other testimony for defendant was given tending to corroborate the material points of the evidence just outlined.

Plaintiff admitted that under the chattel mortgage held by defendant, defendant had the right to take the wagon.

The court, against the objection of defendant, permitted plaintiff as a witness to testify that he had employed a person to help him (plaintiff) search for the property.

Plaintiff was further permitted to show that the value of his own time was "about $25 a day" and that

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it took him four days to get the property back into his possession after defendant had taken it.

The objection urged to these points of evidence was that plaintiff had not claimed such damages in his petition. The court overruled the contention.

The foregoing is a sufficient sketch of the facts for the purpose of this review.

The court at the instance of plaintiff gave the following instruction:

"2. The jury are instructed that the measure of damages plaintiff may recover is the amount of the damage or injury done to the property during the time it was in defendant's possession, and in unloading and placing the same when returning it to 1910 Franklin avenue from where it was taken; also the reasonable market value of the two Beacon burner lamps at the time they were taken, if you believe from the evidence said Beacon burner lamps were so taken and not returned; and the value of plaintiff's time and expense incurred, if any, in trying to locate and recover possession of the property, which you may find and believe from the evidence, was taken from plaintiff by the defendant, its agents, servants or employees."

There was a verdict for plaintiff for $250 compensatory damages and $250 punitive damages. A judgment followed for $500.

Defendant after an unavailing motion for new trial appealed in the usual way.

The second instruction given in behalf of the plaintiff, above quoted, permitted the jury to award plaintiff as damages, among other things, "the expense incurred, if any, in trying to locate and recover possession of the property." This was not a correct declaration of law, because there was no evidence of any expense incurred by the plaintiff. Moreover, the petition of plaintiff did not sufficiently state such a claim to permit the introduction of testimony along that line.

"Plaintiff was put to considerable trouble in the recovery of said piano and other personal property aforesaid," is the language of plaintiff's claim in the

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particular under discussion. We do not regard that statement as sufficiently definite to warrant the submission to the jury of the issue of expense incurred in recovering the property.

It is familiar law that an instruction should not submit to the jury an issue touching which there is no supporting evidence. It is equally well settled that a claim for special damages (such as in the incurring of expense to recover property taken) must be specifically assigned in the claim which plaintiff makes in a case like this, in order that the defendant may be reasonably advised of the case he is called upon to meet. Timely objections were interposed to the objectionable matter in the trial court and we think the objections were well taken.

For the error aforesaid, the judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

MAGGIE GROOM, Respondent, v. PATRICK KAVANAGH, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Damages:** NEGLIGENCE. A defendant is not liable in every event for the damage caused by his runaway team; but his liability depends on whether or not he took ordinary care to prevent it from running away.

2. ——: ——. The fact that a defendant left a team unattended and unhitched on a public street in a city, is evidence of negligence.

3. ——: ——. A foot passenger when crossing a traveled thoroughfare of a city must use ordinary care to avoid injury by horses and vehicles.

4. ——: ——: ORDINARY CARE. Sometimes in order to observe ordinary care, a footman must look or listen, before attempting to cross a street, but he is not required to do so in such an absolute sense that his omission will always and necessarily defeat an action for damages caused by a collision with a horse or vehicle due to the owner's negligence.

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5. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. And in the case at bar, it was for the jury to say whether the plaintiff was negligent, and if so, whether that negligence contributed to cause the accident.

6. ———: ———: ———: ———: ACCIDENT: LIABILITY. Defendant is not liable to the plaintiff if the casualty was a pure accident, in no way due to the defendant's carelessness.

7. ———: ———: ———: ———: BURDEN OF PROOF. The burden of proof is on the plaintiff to show the defendant was guilty of negligence which caused plaintiff's injury, and on the defendant to show plaintiff was guilty of contributory negligence.

8. ———: ———: ORDINARY CARE. Ordinary care means the degree of care which would be used by a person of common prudence in similar circumstances.

9. **Practice, trial:** ERROR: INSTRUCTIONS. It is not error to refuse to give instructions, which had already been given by the court covering the same propositions.

10. ———: ———: TESTIMONY. Where the testimony of several witnesses tends to show that the defendant left his horses unhitched and unheld while his back was turned to them, he knowing they were spirited horses and had previously run away, if plaintiff is injured by being run over by said horses running away, this made a prima facie case to go to the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferris*, Judge.

AFFIRMED.

STATEMENT OF THE CASE.

The following instructions were requested by the defendant and refused:

"1. The court instructs the jury that under the pleadings and all the evidence, the plaintiff can not recover in this case and your verdict will be for defendant.

"2. The court instructs the jury that if they believe from the evidence that the plaintiff stepped on the street and in front of said runaway horses without looking or listening, or without trying to prevent coming in contact with them, then your verdict will be for defendant.

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"3. By ordinary care is meant that which a person of common prudence takes of his own concerns, or that degree of care, which men of common prudence exercise about their own affairs; in determining what would be ordinary care in this particular case, reference must be had to the actual state of society, business habits and general usages peculiar to the time and country. What would be ordinary care and prudence in crossing or attempting to cross a street by one who could not only see but hear, might be negligence in one attempting to do the same thing who could only see but not hear.

"4. Although you may believe from the evidence that defendant Kavanagh was negligent, as defined in these instructions, still if you further believe that the plaintiff, Maggie Groom, saw, or by the exercise of ordinary care could have seen, the runaway horses of defendant in time to have gotten out of their way or kept out of their way, and on account of her failure to do so was injured, then she was guilty of such contributory negligence as will bar her recovery herein, and you must find for the defendant.

"5. The jury are further instructed that while it may have been the duty of defendant to have exercised ordinary care and diligence in preventing, or trying to prevent, his said horses from running away, yet a duty also devolves upon the plaintiff. And, if she saw the horses coming, or might, by looking or listening, have seen or heard them coming, she could have gotten out of their way, or kept out of their way, but did not, then your verdict will be for the defendant.

"6. The court instructs the jury that if they believe from the evidence that the plaintiff saw the horses approaching or knew of their approach before she got upon the street and in their way, or could have seen said horses by looking, or heard them by listening, then the failure of defendant to observe ordinary care and watchfulness in hitching and guarding his said horses (if a fact) is immaterial, and your verdict will be for defendant."

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The following instructions were given at defendant's request:

"A. The court instructs the jury that the defendant was not bound under all circumstances to prevent his horses from running away unless you believe that he failed to exercise that degree of care and prudence which an ordinarily careful and prudent person would have exercised under like circumstances, then your verdict will be for the defendant.

"B. The court instructs the jury that if they believe from the evidence that the injuries of plaintiff were the result of mere accident or casualty, and not of negligence on the part of the defendant, then your verdict will be for the defendant.

"C. Although the jury may believe from the evidence that defendant was guilty of negligence in failing to guard his said horses so as to prevent them from running away, yet if they also believe from the evidence that the plaintiff was also negligent in failing to discover the approach of said horses in time to have kept out of their way, or to have gotten out of their way, if in it, then your verdict will be for the defendant."

The following instructions were given by the court of its own motion:

"D. The court instructs the jury that the plaintiff claims that her injuries were occasioned by the following negligence on the part of the defendant; that is to say: that the defendant negligently left a team of horses owned by him, unhitched and unguarded and negligently permitted them to run away and over plaintiff, by reason of which she was greatly injured.

"These allegations, the defendant has denied in his answer. Defendant has also alleged, by way of an affirmative defense, that whatever injuries plaintiff sustained by his horses were caused in whole or in part by his own contributory negligence.

"The mere fact that the horses ran away and the plaintiff was run over and severely injured do not of themselves make defendant liable in this case. The gist of the action is the charge that the defendant failed to

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exercise ordinary care, diligence and watchfulness, thereby causing these injuries. The burden of establishing this charge is upon the plaintiff and if the evidence, bearing on this proposition does not preponderate in favor of the plaintiff, then the jury will find for the defendant.

"By a preponderance of evidence is meant that the evidence in support of the proposition, in your judgment, outweighs that to the contrary. The burden of proving any negligence of the plaintiff or of proving the facts, when under these instructions are defined as constituting such negligence, is upon the defendant to establish the truth of them to your satisfaction by a preponderance of evidence in regard to them.

"E. The court instructs the jury that if you find and believe from the evidence that on the thirtieth day of January, 1902, Dickson, O'Fallon and Twenty-first streets, were open and public streets in the city of St. Louis, and if you further find and believe from the evidence that defendant was on said date, January 30, 1902, the owner, and in charge of a span of horses attached to a sleigh, and that he negligently left said horses standing on Dickson street and walked away from said horses, and that said horses were unhitched, unguarded and unattended, and that said horses ran away and then upon and over plaintiff at the intersection of said Twenty-first and O'Fallon streets, and that plaintiff received the injuries complained of directly thereby, and if you further find and believe from the evidence that the plaintiff was at said time exercising ordinary care for her own protection, then the defendant is liable in this case and your verdict should be for the plaintiff.

"F. If you find and believe from the evidence that the plaintiff was struck by the runaway horses while she was crossing the street, and that she stepped onto the street or crossing and in front of said horses without exercising ordinary care in looking or listening for the approach of horses or vehicles, and if you believe that if she had exercised such ordinary care she could

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have seen or heard the team in time to have prevented the collision and gotten away, then your verdict should be for the defendant, although you may believe that he was guilty of negligence in allowing the team to run away.

"It is the duty of a person crossing a public street in the city to exercise ordinary care and prudence in avoiding the danger of collision with horses on such street, and you are to determine from all the evidence in the case whether or not the defendant exercised such ordinary care.

"G. The court instructs the jury that with respect to the allegations of contributory negligence set up in the defendant's answer, the burden of proof rests upon the defendant, that is, the defendant must prove to your satisfaction by a preponderance of evidence that the plaintiff did not exercise ordinary care for her own protection.

"H. By 'preponderance of evidence' as used in these instructions, is not necessarily meant the greater number of witnesses, but the greater weight of the evidence; that is, that the evidence in support of the proposition to be proved is, in your judgment, of more weight than the evidence against it.

"By 'ordinary care,' as used in these instructions, is meant that degree of care which would be used by a person of ordinary prudence under like or similar circumstances.

"By 'negligence,' as used in these instructions, is meant the absence of ordinary care under the circumstances shown in evidence."

It is unnecessary to copy the instruction on the measure of damages, as no point is made against it.

T. J. Rowe and *H. N. Moore* for appellant.

James J. O'Donohoe for respondent.

(1) "Every person has a right to presume that every other person will perform his duty and obey the

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law, and it is not to be denounced as negligence for him to assume that he is not exposed to danger which can only come through the disregard of law on the part of another." Moberly v. Railroad, 17 Mo. App. 518. (2) The entire law of this case is embodied in the following cases: Ward v. Steffen, 88 Mo. App. 571; Becker v. Schutte, 85 Mo. App. 57; Jennings v. Schwab, 64 Mo. App. 13; Hall v. Huber, 61 Mo. App. 384.

GOODE, J.—The substance of the case on which plaintiff obtained judgment for fifteen hundred dollars for personal injuries is, that she was struck by a team of runaway horses hitched to a sleigh on one of the public streets of St. Louis and badly hurt. She charges in her petition that defendant carelessly left his team standing on Dickson street without being fastened, hitched, guarded or in any way attended so as to prevent it from running away, and that while plaintiff was passing west over O'Fallon street and in the act of passing from the south to the north side thereof, at or near its intersection with Twenty-first street, said horses and sleigh, on account of being carelessly left by defendant without restraint, ran over her throwing her against the street and sidewalk and permanently injuring her. It is further charged that the horses were wild and subject to take fright and run away and that their disposition in this regard was well known to the defendant.

The testimony for plaintiff tended to establish the allegations of the petition and to show that defendant, who had been sleighriding with a young lady, left the team standing unhitched in front of the gate of her residence with no one holding the reins, while he assisted his companion to alight from the sleigh; that when the horses started to run, defendant was standing between the curbstone and the gate with his back to the horses engaged in conversation with the lady; that the horses were blooded, high-strung animals and had previously run away while defendant was driving them, so that he had knowledge of their wild proclivities.

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The team started to run in front of No. 2422 Dickson street and continued until they ran over the plaintiff as she was crossing Twenty-first street at its intersection with O'Fallon. Plaintiff is very dull of hearing and while the sleighbells on the harness were ringing, she might not have heard them on that account.

It seems there is a jog in Twenty-first street where it meets O'Fallon, so that the north end of Twenty-first street starts from O'Fallon somewhat west of the line from which the south end runs into O'Fallon.

Plaintiff's testimony is not clear as to her position on Twenty-first and O'Fallon streets when she was struck by the horses, but tends to prove it was such that she was unable to see north on Twenty-first street, from which direction the team ran on her, because of said jog; hence, she did not look north on Twenty-first street, or looked but slightly, before she attempted to cross, and the team was on her before she had a chance to get out of the way.

The defendant owned the horses and excused their escape as follows: When he drove up to the curb in front of the young lady's house on Dickson street, he got out of the sleigh; and, still holding the lines, assisted her to alight. At the time, to-wit, about seven o'clock on January 30, 1902, the streets and sidewalks of the city were covered with ice and snow, and as the young lady was being assisted from the sleigh by the defendant his foot slipped and he fell to the ground. His fall caused him to jerk the reins of the horses, which alarmed them so that they escaped from his control and ran off.

There was evidence for the defendant tending to prove the plaintiff had an unobstructed view along Twenty-first street to the north before she attempted to cross, and that the jog in the street in no way interfered with her view. There was also testimony that O'Fallon and Twenty-first streets were much used thoroughfares and many vehicles passed along them at the hour of day when this accident happened.

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Exceptions were saved by the defendant to the court's rulings on the instructions and the correctness of those rulings is the question for determination on this appeal.

The instructions given to the jury show the trial judge thought the rules of law applicable to the case were as follows:

First. That the defendant was not liable in every event for damage caused by his runaway team; but that his liability depended on whether or not he took ordinary care to prevent it from running away.

Second. That if he left it unattended and unhitched on the public street, those facts were evidence of negligence and of consequent liability on his part to persons injured by the horses.

Third. That a foot-passenger when crossing a traveled thoroughfare of a city must use ordinary care to avoid injury by horses and vehicles.

Fourth. That sometimes in order to observe that kind of care, a footman must look or listen, before attempting to cross a street, but that he is not required to do so in such an absolute sense that his omission will always and necessarily defeat an action for damages caused by a collision with a horse or vehicle due to the owner's negligence. In other words, that in some instances, and in the present one, it was for the jury to say whether the plaintiff was negligent, and if so whether that negligence contributed to cause the accident.

Fifth. That the defendant is not liable to the plaintiff if the casualty was a pure accident, in no way due to the defendant's carelessness.

Sixth. That the burden of proof was on the plaintiff to show the defendant was guilty of negligence which caused her injury, and on the defendant to show she was guilty of contributory negligence.

Seventh. That ordinary care means the degree of care which would be used by a person of common prudence in similar circumstances.

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Those propositions are all sound law and most of them are so trite as to need no support by argument or citations. They were appropriate, too, to the issues in this case wherein all the material facts had to be found from contradictory testimony.

The refused instructions, except the first one which was in the nature of a demurrer to plaintiff's case, were covered by those the court gave, as will be easily seen by a comparison.

In favor of the motion that a nonsuit should have been ordered, appellant's counsel argue that the law requires a person about to cross a city street to always look or listen for approaching horses or vehicles; but that is pushing the rule too far. Circumstances may occur which will excuse a person for omitting to look or listen for trains before going on a railroad track, though the precaution is specially necessary in such instances. Kenney v. Railway, 105 Mo. 270; Jennings v. Id., 112 Mo. 268; Baker v. Id., 122 Mo. 593. Certainly no more care need be taken in crossing a street than in crossing a railway, and the duty incumbent on a traveler in either case is to take ordinary care; though this usually requires him to look or listen before venturing on a railway track and may require him to do so before he crosses a street. But various facts must be considered in deciding whether he was negligent if he did not look or listen; such as the quantity of travel on the street and the opportunity to see and hear approaching animals and conveyances.

The facts before us, as testified to by the plaintiff, show it would have been an incorrect charge if the trial court had instructed the jury the plaintiff could not recover because she failed to look or listen for vehicles coming along Twenty-first street from the north before she attempted to pass over the crossing of that street and O'Fallon. She could scarcely hear, so listening would have been useless; and in fact she did listen to the extent she could. She swore that from the direction she took in crossing it was impossible to see

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along Twenty-first street because a house obstructed her view. These facts, if true, proved she was not guilty of contributory negligence in omitting to look or listen. Baker v. Railway, supra; Johnson v. Id., 77 Mo. 547; Donohue v. Id., 91 Mo. 357; Petty v. Id., 88 Mo. 306. That being the law, her testimony was to be weighed by the jury against the testimony given by witnesses to the contrary. The decision in Baker v. Savage, 45 N. Y. 191, is not necessarily opposed to ours, because all the testimony in that case showed the plaintiff therein could have seen the wagon which hurt her, by a mere glance, and in time to get out of the way. What this plaintiff was bound to do was to use ordinary care in going over the crossing, and the jury were so told. They were instructed that if they found the plaintiff stepped on to the crossing and in front of the horses without exercising ordinary care in looking and listening for the approach of horses or vehicles, and further found that if she had exercised such ordinary care she could have seen or heard the team in time to prevent a collision, the verdict should be for the defendant. That charge fully submitted the defense, unless we hold the plaintiff was bound to look and listen whether she could see or hear or not, or hold that her positive testimony that she could not see was of no weight; and of course we will do neither.

The testimony of several witnesses that the defendant left his horses unhitched and unheld while his back was turned to them, he knowing they were spirited horses and had previously run away, made a prima facie case to go to the jury. Ward v. Steffen, 88 Mo. App. (St. L.) 571; Becker v. Schutte, 85 Mo. App. (K. C.) 57.

All the issues of fact were controverted, and as the jury determined them by the aid of accurate charges, and the trial judge refused to set aside the verdict as being opposed to the weight of the evidence, the judgment is affirmed. *Bland, P. J.*, and *Barclay, J.*, concur.

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99	[6]369
100	[4]373
100	385
97	373
101	[4] 60
102	[3]156

GEORGE E. GEBHARDT, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Street Railways:** ORDINANCE OF THE CITY OF ST. LOUIS: NEGLIGENCE: ACTION: PERSONAL INJURY: ALLEGATION: PROOF: PETITION: PRACTICE TRIAL. McQuillin's Ann. Mun. Code of the city of St. Louis page 797, section 1760, providing that the person in charge of a street car shall keep a vigilant watch for all vehicles and persons on foot, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible, is a police regulation conferring a right of action on a party injured in consequence of a violation of it, without any allegation or proof that the ordinance has been accepted by the street car company.

2. **Constitution:** COURT OF APPEALS: SUPREME COURT: PRACTICE, APPELLATE. The Constitution makes it the duty of the Courts of Appeals of Missouri to follow the last controlling decision of the Supreme Court.

3. **Ordinance of the City of St. Louis:** DUTY: EXTRAORDINARY CARE. In the case at bar, the ordinance of the city of St. Louis (McQuillin's Ann. Mun. Code, section 1760), does not create a new duty, nor require the exercise of extraordinary care by the motorman of a street car.

4. **Street Railways:** DUTY OF MOTORMAN ON STREET CAR: CITY ORDINANCE, MEANING OF: HUMANITARIAN DOCTRINE, WHAT IT IS. In the case at bar, the ordinance of the city of St. Louis (McQuillin's Ann. Mun. Code, section 1760) is simply declaratory of the municipality's approval of what is commonly called "the humanitarian, or last-chance doctrine," to-wit, that it is the duty of the motorman in charge of a running street car to keep a vigilant watch ahead and when he sees, or by the exercise of due diligence could have seen, the peril of the plaintiff in time to have avoided injuring him, and fails to do so, the company will be liable.

5. **Definition.** The meaning of the phrase "shortest time and space possible" is uncertain, and the incorporation of this phrase in an

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instruction, without explanation, in a personal injury action against a street railway, is misleading.

6. **Petition:** PRACTICE: COMMON LAW: PLEADING AND NEGLIGENCE; MISJOINDER OF CAUSES OF ACTION. A petition in an action for personal injuries which joined in the same count a cause of action for common-law negligence and one for negligence under the provisions of a city ordinance, such as in the case at bar, is not objectionable for misjoinder of causes of action.

7. **Contributory Negligence:** TESTIMONY: EVIDENCE. Where plaintiff, injured by a street car at a crossing, testified that he could not see the car on account of an obstruction, and that he did not hear it, it was proper to submit the issue of contributory negligence to the jury, though other witnesses, similarly or not so advantageously situated, testified that they saw the car one hundred and fifty feet away.

8. **Street Railways:** DUTY OF CONDUCTOR OF STREET CAR. The conductor of a street car is not required to keep a lookout to avoid accidents at street crossings.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge,

AFFIRMED.

Boyle, Priest & Lehmann, Geo. W. Easley and *Walter H. Saunders* for appellant.

(1) The motion to elect, filed by defendant at the threshold of plaintiff's case, should have been sustained, because the petition pleaded in one count three common-law acts of negligence, all of which are *ex delicto* and constitute one cause of action, and also attempted to plead a violation of the vigilant watch ordinance, which is *ex contractu,* because passed by the city under its contractual powers, and the observance thereof made a condition of the operation of the street railroad and, therefore, constituted another distinct cause of action. 5 Enc. Pl. and Pr., 303; Pomeroy's Remedies and Remedial rights, secs. 452-453 et seq; Bliss on Code Pleading (3 Ed.), sec. 1; 1 Estee on Pleading (4 Ed.), sec. 128. (2) The petition did not plead that defendant had accepted this ordinance, and it could not be

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introduced in evidence without both pleading and proof of acceptance. (3) The petition in this case alleges that the violation of this ordinance "contributed to cause" plaintiff's injuries, which does not exclude the idea of plaintiff's contributory negligence, and, therefore, the ordinance is not in any event properly pleaded and should not have been introduced in evidence over defendant's objection. (4) The demurrer to the evidence should have been sustained. The plaintiff could have seen and heard the approaching car had he looked and listened, and could by ordinary care have avoided the injury. Watson v. Railroad, 133 Mo. 250. (5) Instruction No. 2 given for plaintiff declared in effect that is was a common-law duty of the motorman to keep a vigilant watch for plaintiff and stop the car in the shortest time and space possible under the circumstances. This is an incorrect exposition of the common law which exacts of the motorman only ordinary care toward people, or vehicles, on the street, which is a shifting standard, depending upon varying traffic conditions. Stanley v. Railroad, 114 Mo. 606.

Chas. E. Hannauer and *W. R. Schery* for respondent.

(1) The ordinance requiring the operator of a street car to keep a vigilant watch for vehicles and persons on foot, either on the track or moving towards it, and to stop promptly, is a mere regulation in respect to the running of the car, and a failure to perform the duties required does not create a cause of action, but furnishes evidence of negligence in operating the car. Senn v. Railway, 135 Mo. 517; King v. Railway, 98 Mo. 239; Jackson v. Railway, 157 Mo. 621. (2) No error was committed in overruling defendant's motion to elect. Plaintiff's petition stated but one cause of action. He was not confined to allege only one act of negligence, but could state as many as he thought he would be able to prove, whether common law or statutory, or both. (3) The "vigilant watch ordinance" is a police regu-

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lation; a person injured because of the violation of the ordinance can recover in a suit for damages, whether such ordinance has been accepted by the railroad company or not. The violation of the ordinance is negligence *per se.* Jackson v. Railway, 157 Mo. 621, and cases cited; 1 Shearman & Red. Neg. (5 Ed.), sec. 13; Karle v. Railroad, 55 Mo. 476; Keim v. Union Ry. & Tr. Co., 90 Mo. 314; Weller v. Railway, 164 Mo. 180.

BLAND, P. J.—The petition charges that, "On July 27, 1900, while plaintiff was driving a horse and buggy west on Courtois street, in the city of St. Louis, across defendant's track on Michigan avenue, his buggy was struck and demolished by a car of the defendant, throwing him to the center of the defendant's track, dragging him more than fifty feet, and causing a fracture of one bone in the right arm, and other injuries."

The negligence charged is:

"1. That the employees of the defendant, in charge of the car, negligently and carelessly and unskillfully ran and operated said car at a highly improper, great and injurious rate of speed.

"2. That the mortorman, in charge of the car, failed to keep a vigilant watch ahead for the plaintiff, and failed to stop said car within the shortest time and space possible under the circumstances.

"3. That the defendant, by its agents, failed to ring the bell or give any warning of the approach of said car."

The petition then set out the ordinance commonly called the "vigilant watch" ordinance, and charged that the motorman of defendant's car violated its provisions, and that "the failure of defendant to keep the provisions of said article, as it was bound to do, directly contributed to cause the injuries to plaintiff herein complained of."

Defendant moved the court to compel plaintiff to elect upon which one of the causes of action stated in the petition he would stand, for the following reasons:

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"1. Because the plaintiff has improperly united in the same count of his petition a cause of action founded upon common-law negligence with one arising upon what is commonly known as the 'vigilant watch' ordinance.

"2. Because the plaintiff has improperly united in the same count of his amended petition a cause of action arising *ex delicto* with another cause of action arising *ex contractu*.

"3. Because the plaintiff has improperly united a cause of action at common law with a cause of action based upon an ordinance."

The motion was denied.

The answer was a general denial and a plea of contributory negligence, alleging that plaintiff drove upon the track in front of a moving car without looking or listening for its approach, which he might have seen or heard, and that he negligently whipped up his horse and attempted to drive across in front of the approaching car when it was too close for him to safely do so.

The reply was a general denial.

The evidence is that plaintiff was driving west on Courtois street in a storm buggy with the curtains raised, in daylight, in the city of St. Louis, on the twenty-seventh day of July, 1900; that Courtois street crosses Michigan avenue running north and south. In Michigan avenue in a single railroad track. While attempting to cross Michigan avenue on Courtois street plaintiff's buggy was struck by defendant's electric street car running north and plaintiff was injured.

Plaintiff's evidence is that he listened before attempting to cross Michigan avenue but did not hear the approaching car; that he looked but could not see it for the reason that his view was obstructed by a wagon and that he did not see the car until it was upon him.

Other witnesses testified that they saw the car as it approached the crossing and that the motorman in charge had his head turned toward the inside of the car, seemingly engaged in conversation with some one in the car.

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On the part of defendant the evidence tends to prove that had plaintiff listened he could have heard the car and had he looked he could have seen it; that the wagon he mentioned as obstructing his view did not obstruct it, and that he could have seen the car at least one hundred and fifty feet south of the crossing had he looked; that the car was running at a speed not exceeding six or seven miles per hour and that the bell was sounded one hundred and fifty feet from the crossing until it collided with plaintiff's buggy; that the motorman saw the plaintiff, when he was within twenty-two to twenty-three feet of the track, stop his horse and then suddenly whip it up and undertake to run around the car and make the crossing ahead of it; that as soon as he saw this move on the part of plaintiff he reversed the power, and another motorman who was on the platform with him, applied the brakes and that every effort was made by both to stop the car but it was so near onto plaintiff that it could not be stopped in time to prevent the injury.

Plaintiff recovered a judgment from which the defendant, after an unavailing motion for new trial, appealed.

On the motion to elect, and throughout the trial, the court treated what is commonly known as the vigilant watch ordinance as a police regulation. The correctness of this view of that ordinance is challenged by the appellant. Its contention is that the ordinance is contractual and that a street railroad company can not be held to the extraordinary care the ordinance requires of a motorman unless its acceptance of the ordinance is both pleaded and proved by the plaintiff.

The fourth subdivision of section 1760 (the ordinance in question) McQuillin's Annotated Municipal Code, page 797, reads as follows:

"The conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to such persons

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or vehicles, the car shall be stopped in the shortest time and space possible."

In Fath v. Tower Grove & LaFayette R'y Co., 105 Mo. 537, it was held that the city of St. Louis had power to pass the ordinance, but that it was beyond its power, by legislation, to create a civil liability enforcible at common law, but that it might exact of a street railway company compliance with the ordinance as a condition for the privilege of laying its tracks in the streets of the city, and that a yielding by the street railway company to the exaction would create a contractual relation between the city and the company and a breach of this contract, whereby a private person was injured, would render the company liable to such person for the injury.

The doctrine announced in the Fath case has been approved in Senn v. The Southern Ry. Co., 108 Mo. l. c. 152; Sanders v. Southern Electric Ry. Co., 147 Mo. l. c. 425; Byington v. St. Louis R. R. Co., 147 Mo. 673.

In Holwerson v. St. L. & Suburban Ry. Co., 157 Mo. 256, it was held by MARSHALL, J., in division one, that the ordinance was penal, intended as a police regulation, and confers no right of action against the street railways upon the person injured by its cars and that a company violating the ordinance was subject only to the penalty prescribed by section 1772, article 6, McQuillin's Municipal Code. None of the other judges of the division concurred in this view of the ordinance.

In Jackson v. K. C., Ft. S. & M. Ry. Co., 157 Mo. 621, in an opinion by BURGESS, J., in division two, concurred in by GANTT, P. J., the doctrine of the Fath case is expressly disapproved, SHERWOOD, J., dissenting to so much of the opinion as disapproved of the doctrine of the Fath case. The ordinance under review in the Jackson case was one regulating the speed of trains on steam railways through a city of the fourth class. It was held that the city had power to pass the ordinance; that the ordinance was a police regulation, and injuries due to its violation were re-

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coverable by the injured party. The vigilant watch ordinance was not before the court, but an ordinance of the same character, namely, an ordinance regulating the running of trains through a city was under consideration and the whole subject-matter was ably and exhaustively discussed by Judge BURGESS. The conclusion was reached, that ordinances of this class are police regulations, and injuries due to their violation were recoverable by the injured party and the doctrine of the Fath case was expressly disapproved.

Schmidt v. St. Louis Ry. Co., 163 Mo. 645, is cited by defendant as supporting the doctrine of the Fath case. It was held in that case that the objections to the introduction of the ordinance as evidence were not sufficiently specific to call the attention of the court to the point that the ordinance had not been accepted by the defendant company, but whether or not the defendant was bound by the ordinance, without having accepted it, was not decided or discussed and the case is not authority in support of the Fath case.

In Anderson v. Union Terminal Ry. Co., 161 Mo. l. c. 420, the cases of Sanders and Byington were approvingly cited, but the doctrine of the Fath case was not discussed.

The Constitution makes it our duty to follow the last controlling decision of the Supreme Court. We have not been cited to any decision of that court, nor have we found one, in which the doctrine of the Fath case was discussed, more recent than the Jackson case. We conclude, therefore, that the Jackson case is the most recent direct expression from the Supreme Court on the doctrine of the Fath case and hold that the ordinance in question is a police regulation and that an injury due to its violation affords the injured party a right of action. We are not persuaded that the ordinance creates a new duty or requires the exercise of extraordinary care by the motorman; on the contrary, it seems to us that the ordinance requires of him the exercise of only ordinary care, a care commensurate with the dangers constantly present with the running

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of street cars in a populous city where the streets are thronged with pedestrians and crowded with all kinds of vehicles, continually passing on and crossing the street car tracks. To keep a vigilant watch for vehicles and persons on foot on the track, crossing the track or moving toward the track with the evident purpose of crossing it and to stop the car by a timely and reasonable endeavor to avoid a collision, is not requiring of the motorman any greater vigilance or exertion than a reasonable prudent and humane man would be expected to exercise in the same circumstances. Schmidt v. St. Louis Railroad Co., 149 Mo. l. c. 284; Schmidt v. St. Louis Ry. Co., 163 Mo. 645; Conrad Grocer Co. v. Railroad, 89 Mo. App. (St. L.) 391; Cobb v. St. L. & Han. Ry. Co., 149 Mo. 609; Keown v. St. L. R. R. Co., 141 Mo. 86; Quirk v. St. L. United Elevator Co., 126 Mo. 279; Fuchs v. St. Louis, 133 Mo. 168; Gutridge v. The Mo. Pac. Ry. Co., 105 Mo. 520; Bowen v. The C., B. & K. C. Ry. Co., 95 Mo. 268; Miller v. St. Louis R. R. Co., 5 Mo. App. l. c. 478.

Our understanding of the ordinance is, that as to individuals it is simply declamatory of the municipality's approval of what is commonly called "the humanitarian, or last chance doctrine," to-wit, that it is the duty of the motorman in charge of a running street car to keep a vigilant watch ahead, and when he sees, or by the exercise of due diligence could have seen, the peril of the plaintiff in time to have avoided injuring him, and fails to do so, the company will be liable, which is the law in this State. In this view of the ordinance it is preferable to plead the facts constituting this phase of negligence rather than the ordinance.

The language of the last clause of the fourth subdivision of the ordinance, to-wit, "to stop the car in the shortest time and space possible," is unfortunate. If taken literally it furnishes no guide to ascertain in what time and space a car may be ordinarily stopped. It is possible for a motorman of extraordinary strength to apply the brake of his car more effectually and to stop the car in a shorter time and space than can one of

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ordinary strength. Which of these possibilities is to control? The possible time and space in which a Hercules could have stopped the car, or the possible time and space in which a man of ordinary strength could have done so? Comparisons of possibilities are impracticable in the trial of a lawsuit and can result only in uncertainty and confusion, and courts uniformly refuse to speculate on the mere possibility of human action, but confine themselves in their estimation of a man's conduct to the measurement of it by the conduct of ordinary men of the same class, in respect to the same subject-matter in the same or like circumstances. We think, therefore, that it is misleading to incorporate the ordinance bodily in an instruction to the jury, and that in its stead, when the pleadings and the evidence call for it, the approved form of an instruction declarative of the humanitarian doctrine should be given. For this reason instruction number one given for the plaintiff embodying the ordinance is disapproved.

2. It is contended by defendant that plaintiff can not join common-law and statutory negligence in the same count or cause of action. This contention is settled by the case of Senn v. Southern Ry. Co., 135 Mo. l. c. 519, where it is said, in a like case, that "To state and prove his case, plaintiff was not confined to one negligent act. He had the right to state and prove either statutory or common-law negligence or both."

3. At the close of plaintiff's evidence defendant offered an instruction in the nature of a demurrer thereto. The refusal of the court to give this instruction is assigned as error. The contention of defendant is that the plaintiff could have seen and heard the approaching car had he looked and listened. This may be true as a fact, but the plaintiff testified that he could not see the car on account of an obstruction and that he did not hear it. It was for the jury, not the court, to pass on the credibility of this evidence, however improbable it may have seemed to defendant's counsel and notwithstanding the fact that other witnesses similarly situated, or not so advantageously situated as was the

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plaintiff to see the car, testified that they saw it one hundred and fifty feet from the crossing where the collision took place.

4. The third instruction given for the plaintiff told the jury that it was the duty of both the motorman and conductor to keep a vigilant lookout, etc. This was palpable error. No such duty is required of the conductor. His duties are such as to call him to the rear platform and interior of the car and to give his attention to passengers on the car and to those alighting from and entering the car by way of the rear platform, and to give signals for starting and stopping the car. Holwerson v. Railroad, supra.

The judgment is reversed and the cause remanded. *Barclay* and *Goode, JJ.*, concur in the result, and the latter thinks the vigilant watch ordinance is held by the Supreme Court to require more than ordinary care.

OPINION ON MOTION FOR REHEARING.

BLAND, P. J.—In his motion for rehearing plaintiff calls our attention to an instruction given in the case of the Conrad Grocer Co. v. Railroad, 89 Mo. App. (St. L.) 391, in which case the jury was told that it was the duty of the motorman and *conductor* to keep a vigilant watch, etc., and to the fact that the judgment in that case was affirmed whereas the judgment in the case at bar was reversed for error in giving a substantially identical instruction. The instruction in the Conrad Grocer Company case was not objected to on the ground that the jury was instructed that it was the duty of both the *motorman* and *conductor* to keep a vigilant watch, etc., and this feature of the instruction is nowhere mentioned in the opinion in that case and was evidently overlooked. The opinion in the case places the duty to keep a vigilant watch, etc., on the motorman alone. The case is, therefore, not authority for the notion that it is always the duty of both motorman and conductor to keep a vigilant watch, etc. Situations might be found when it would be the duty of both

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the motorman and conductor to observe all the requirements of the ordinance, but they do not exist in the Conrad Grocer Company case nor are they to be found in this case.

The motion for rehearing is overruled. *Barclay* and *Goode, JJ.*, concur.

AUGUSTA KREYLING et al., Appellants, v. M. B. O'REILLY et al., Defendants; BENJAMIN HORTON et al., Respondents.

St. Louis Court of Appeals, December 23, 1902.

1. **Mortgage and Deed of Trust:** SURPLUS MONEY ARISING FROM SALE, DISPOSITION OF: RULES OF LAW. Surplus money realized by the sale of land under a mortgage or deed of trust is treated as realty and not as personalty, in respect to the rules of law governing its disposition. It remains real estate in the hands of the mortgagee or trustee to be disposed of according to the laws of real property.

2. ———: ———: ———: ———. Where a person dies seized of real estate incumbered by mortgage, and the mortgage is thereafter foreclosed, the surplus is regarded as realty and goes to the heirs of the decedent instead of his personal representatives.

3. **Statute of Limitations:** STATUTORY CONSTRUCTION. The construction of section 4277, Revised Statutes 1899, is that the limitation therein contained applies as well to suits to enforce a mortgage or deed of trust by proceeding against the proceeds of the mortgaged land, as to those which proceed against the land itself.

4. ———: ———: CONSTRUCTION OF CONSTITUTION. Section 4277, Revised Statutes 1899, is constitutional and does not impair the obligation of contracts.

5. ———: ———: RETROSPECTIVE ACT: RIGHT: REMEDY. And section 4277, Revised Statutes 1899, is not retrospective: it was designed to affect securities given before it was adopted but it only affects the remedy and not the right.

6. ———: ———: ———: CONSTRUCTION OF CONSTITUTION. Section 15, article 2, Constitution of Missouri, does not mean that no statute relating to past transactions can not be passed, but merely

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that none can be passed which tells on such transactions to the substantial prejudice of the parties interested.

7. **Jurisdiction of Courts of Appeal:** PRACTICE, TRIAL: PRACTICE, APPELLATE. In order to oust the Courts of Appeals of Missouri of jurisdiction on a constitutional question, the question must be in the trial court and the benefit of some constitutional provision denied to the party who claims it.

8. **Practice, Appellate:** AMENDMENT OF ABSTRACT OF RECORD. An abstract of the record filed in the Court of Appeals may be amended on the authority of the Supreme Court in Lane v. Railway, 132 Mo. 4.

Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood,* Judge.

REVERSED AND REMANDED *(with directions).*

T. D. Cannon and *E. T. Farish* for appellants.

(1) The certified copy of the deed of trust of date April 23, 1877, on which the respondents' claim is predicated, was not properly admitted in evidence, because the acknowledgment thereof was not in accordance with the statute in force when the acknowledgment was taken. Garner v. Barry, 28 Mo. 438; Calloway v. Fash, 50 Mo. 420; Patterson v. Fagan, 38 Mo. 70; Hoskins v. Atkins, 77 Mo. 539; Hunt v. Selleck, 118 Mo. 588. (2) Under sections 4276, 4277, Revised Statutes 1899, the respondents' right to foreclosure of the deed of trust dated April 23, 1877, was barred two years after the passage of the act: i. e., 1893. Or, if the statute of limitations is assumed not to have run in favor of the estate between the death of David Kreyling and the appointment of his administrator, then, two years from June 8, 1898: i. e., on June 8, 1900. And no claim to the fund in question can be predicated upon said deed of trust after that date. McLean v. Thorp, 4 Mo. 257; Stevens v. Bank, 43 Mo. 385; Cranor v. School District, 81 Mo. App. 153; Cranor v. School District, 151 Mo. 119. The death of Holthaus, trustee, in

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no way affected the situation. White v. Stephens, 77 Mo. 452; Schanewerk v. Hobercht, 117 Mo. 22. (3) The note for $1,189.95, due April 26, 1878, was barred by limitation April 26, 1888 (ten years), and the deed of trust, purporting to secure the same, was presumed to be satisfied after the lapse of twenty years, i. e., 1898. Smith v. Benton, 15 Mo. 372; Marian v. Detchmundy, 18 Mo. 522; Carr v. Dings, 54 Mo. 95; Cape Girardeau Co. v. Harbison, 58 Mo. 90; Wilson v. Albert, 89 Mo. 537; Wilson v. Mitchell, 112 Mo. 300. (4) The respondents were guilty of such laches as barred their claim and precluded recovery. Smith v. Clark, Ambler R. 645; State ex rel. v. West, 68 Mo. 229; Kline v. Vogel, 90 Mo. 239; Kreoning v. Goehri, 112 Mo. 648.

James E. Withrow for respondents.

(1) It does not appear from plaintiffs' printed abstract, or from the record, that the bill of exceptions was filed in the circuit court in due time, or that it was ever filed in that court; therefore, this honorable court has no jurisdiction, except to dismiss plaintiff's appeal. R. S. 1899, sec. 813; Butler Co. v. Graddy, 152 Mo. 441; Bates Administrator v. Realty Co., 88 Mo. App. 550; Bondurant v. Ins. Co., 73 Mo. App. 447. (2) The certified copy of the deed of trust made by David Kreyling and his wife Augusta, to B. Horton & Co.'s trustee, of date April 23, 1877, was properly admitted in evidence. Even though the acknowledgment should be found to contain a slight clerical error, only purchasers for value can take advantage of it. The plaintiff, Augusta Kreyling, was one of the parties to this deed. The other plaintiffs are the children of David and Augusta Kreyling, and therefore are not purchasers for value. Mastin v. Hailey, 61 Mo. 196; Bishop v. Schneider, 46 Mo. 472. (3) As between the parties to this suit it would be perfectly good without any acknowledgment. Hannah v. Davis, 112 Mo. 599; Bennett v. Shipley, 82 Mo. 448. (4) Even if the Kreyling note is held to be barred by the statute of limitations, under

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the facts shown in evidence the deed of trust was in full force at the institution of this suit, and will not be presumed to be satisfied. The possession of plaintiff's ancestor having been in its inception friendly, it can not be converted into one of hostility by a mere mental intention; some notice or act indicative of an intent to hold adversely must be brought home to those not in privity with them. Comstock v. Eastwood, 108 Mo. 41. (5) The statute of limitations did not run in favor of David Kreyling's estate, or his heirs, during the time there was no administration upon his estate. Little v. Reid, 75 Mo. App. 266; Woerner's American Law of Administration, sec. 401. (6) In order to charge the respondents with laches it must appear that the plaintiffs have been injured by the delay. Lindell Real Estate Co. v. Lindell, 142 Mo. 61.

GOODE, J.—On July 13, 1876, David Kreyling and Augusta Kreyling, his wife, executed a deed of trust to M. B. O'Reilly, trustee, to secure a note therein described. Under the power of sale contained in that deed, O'Reilly, the trustee, sold the property on October 18, 1901. After paying the indebtedness secured by the instrument and expenses of the sale, a surplus of $1,626.55 remained in his hands. This surplus is claimed by the plaintiffs as the widow and heirs of Kreyling, and is also claimed by the defendants Benjamin and William Horton as the beneficiaries of a junior deed of trust executed by said Kreyling and wife on April 23, 1877. After the sale, Augusta Kreyling and her children instituted suit against O'Reilly for said surplus, and as the present defendants were asserting their claim thereto, O'Reilly appeared and filed a bill of interpleader in which he stated he did not know and could not determine without hazard to himself to whom the surplus belonged, and set out facts respecting the foundation of the two hostile claims. Thereupon he was discharged and the plaintiffs and defendants ordered to interplead, which they did, their pleadings

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showing that their claims are based on the facts above stated.

Against the claim of the defendants Horton, the plaintiffs pleaded several statutes of limitations; the presumption that the debt secured by the Horton deed of trust was paid, more than twenty years having elapsed before they sought to collect it; that defendants' deed of trust shows on its face that it was never acknowledged by Augusta Kreyling in the manner required by the law as it existed when said deed was executed, and that hence her right to the surplus proceeds is superior to defendants' lien.

The note given by Kreyling to the Hortons and secured by their deed of trust was undoubtedly long since barred by the statutes of limitations.

None of the defenses succeeded, but the court below gave judgment in favor of the respondents for the money which the interpleader had paid into court.

We think the defendants' case was barred by the special limitation statutes, first enacted in 1891, in regard to the enforcement of mortgages and deeds of trust after the obligations they were given to secure are barred by the statute of limitations.

Those two statutes are as follows:

"No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust executed hereafter to secure any obligation to pay money or property shall be had or maintained after such obligation has been barred by the statutes of limitations of this State."

"Nor shall any such suit be had or maintained to foreclose any such mortgage or deed of trust heretofore executed to secure any such obligation after the expiration of two years after the passage of this act." R. S. 1899, secs. 4276, 4277.

The first of the above sections has no application to the present case because the defendants' deed of trust was executed prior to its enactment and by its terms it only affects securities subsequently executed. It is

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quoted because it throws light on the next section, which we think controls the decision of this case.

To avoid the bar of the second section, defendants' counsel contends that this suit is not one to foreclose a mortgage or deed of trust as contemplated therein, and hence is not within the intention of the law. Strict foreclosure suits, wherein the mortgagor was given a fixed time in which to discharge his debt on pain of losing his equity of redemption, are obsolete in this State, suits for the sale of mortgaged property under judicial decree and the application of its proceeds to the discharge of the debt secured, having taken their place. We are of the opinion that this action is one of the latter kind and within the spirit of said section if not within its letter.

The defendants as beneficiaries of the second deed of trust, acquired the right of Kreyling, the grantor, to the surplus proceeds arising from the sale of the land under the first deed of trust and are entitled to enforce the lien of their security against said surplus, as far, but no further, than they would be entitled to enforce it against the land itself. In fact, the surplus money realized by the sale of land under a mortgage or deed of trust is treated as realty and not as personalty in respect to the rules of law governing its disposition. It remains real estate in the hands of the mortgagee or trustee to be disposed of according to the law of real property. Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119; Fagin v. Loan Assn., 55 Minn. 437; Dunning v. Ocean Nat'l Bank, 61 N. Y. 497; Beard v. Smith, 71 Ala. 568; Trust Co. v. Url, 110 U. S. 718.

Where a person dies seized of real estate incumbered by a mortgage, as Kreyling did, and the mortgage is thereafter foreclosed, the surplus is regarded as realty and goes to the heirs of the decedent instead of to his personal representatives. Wiltsie on Mortgage Foreclosures, sec. 704; Kinner v. Walsh, 44 Mo. 69, and other cases cited supra.

If there had been no sale under the first mortgage,

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it is plain an action could not have been maintained to foreclose the Horton mortgage, because such an action would have been within the very terms of the limitation created by section 4277. It would be a narrow and inconsistent construction of the law to hold that while it bars an equitable suit against the land itself after the debt secured is barred, such a suit, nevertheless, may be maintained against the proceeds of the land if it happens to be sold. In either case, the thing sought to be done is the same, namely; to collect the debt secured by the enforcement of the security.

It is unnecessary for us to consider in this case the purpose of the Legislature in so phrasing section 4277 that, instead of reading "no suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust" etc., as does section 4276, the words "action or proceeding" are omitted; or to determine whether section 4277 would bar the sale of mortgaged property under a power given in that instrument. That said section bars the present proceeding, we consider clear.

Defendants' counsel argues that section 4298, Revised Statutes 1899, when read in connection with section 4277, compels a construction by which the application of the latter section will be limited to suits of foreclosure, and actions like this one be limited only by the statutes limiting the recovery of real estate; which statute requires an adverse possession for ten years to bring its bar into operation, and no adverse possession of the land covered by the defendants' deed of trust was shown by plaintiffs.

Section 4298 is as follows:

"The provisions of this chapter shall not apply to any action commenced, nor any cases where the right of action or entry shall have accrued before the time when this chapter takes effect, but shall remain subject to the laws then in force."

Just what the effect of that section is we will not endeavor to determine as we think it unnecessary to do so in the present case. It has been held to leave a cause of action subject to any limitation law in force

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when it (said section 4298) was first adopted, even though the right of action had accrued before such limitation law was adopted; thus making the words "then in force" refer to the date of the enactment of said section and not to the date of the accrual of the right. Billion v. Walsh, 46 Mo. 492; Gilker v. Brown, 47 Mo. 105; School Directors v. Georges, 50 Mo. 194.

The section in question had been on our statute books many years before section 4277 was passed, and if the latter, when reasonably interpreted, is repugnant to the former (we do not say it is) the more recent enactment is the governing law; and this rule of construction is not altered because both sections were incorporated in the Revised Statutes. Paul v. Brown, 98 Mo. 675; State ex rel. v. Heidorn, 74 Mo. 410; State v. Clarke, 54 Mo. 17; Roth v. Gabbert, 123 Mo. 20. We have ruled that the reasonable interpretation of section 4277 is that the limitation therein contained applies as well to suits to enforce a mortgage or deed of trust by proceeding against the proceeds of the mortgaged land, as to those which proceed against the land itself, and hence must rule that section 4298 has no bearing on the case.

The constitutionality of section 4277 is assailed by defendant's counsel, who argues that it reduces the time within which mortgages executed before its passage could be foreclosed after the debts secured by them are barred and thereby impairs the obligation of contracts; that prior to its passage the law was that mortgages might be foreclosed, notwithstanding the debts were barred, at any time until there had been a possession by the mortgagor or those claiming under him, adverse to the mortgagee for ten years; that said rule of law became a part of the contract between Kreyling and the Hortons and in so far as the Act of 1891 alters the rule, the act is void.

Two years were allowed by the act within which deeds of trust and mortgages previously executed might be enforced by suit. That was a reasonable time and puts the act outside of the constitutional inhibition

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against the enactment of State laws which impair the obligation of contracts. Terry v. Anderson, 95 U. S. 628; Koshkonong v. Burton, 104 U. S. 668; State ex rel. v. Hager, 91 Mo. 452.

Another argument made in opposition to the validity of section 4277 is, that it is retrospective in effect. So it is in a sense, but not in the technical sense which invalidates laws or restricts their operation to future affairs. That statute, of course, affects securities given before it was adopted and was designed to do so; but it only affects the remedy and not the right. It deprived no security-holder of a vested estate or interest. All deeds of trust and mortgages remained as valid as before, and those previously given, whether the debts they secured were barred or not, were still enforcible and so continued during two years. Our bill of rights prohibits the enactment of laws retrospective in their operation. Const. of Missouri, art. 2, sec. 15. This does not mean that no statute relating to past transactions can be constitutionally passed; but merely that none can be passed which tells on such transactions to the substantial prejudice of the parties interested. Society v. Wheeler, 2 Gall. 105; Leete v. Bank, 115 Mo. 184. The agreement in regard to the retrospective character of the section but brings forward in another guise the point that it impairs the obligation of contracts; but as said, the law deals with the remedy, not the obligation.

We can not dispose of the appeal without deciding these constitutional questions and our jurisdiction is unaffected by them; because the record does not show defendants raised them below, though their brief states they did. But that is not enough to oust the jurisdiction of this court. Lang v. Calloway, 134 Mo. 491. To do that a constitutional question must be raised in the trial court and the benefit of some constitutional provision denied to the party who claims it. Parlin & Orendorff Co. v. Hord, 145 Mo. 117. We do not see how the question can always be shown by the record to have been thus raised and decided, nor how it can be

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done in this case. The defendants had no reason to make the constitutional point by a declaration of law, as this is an equity cause; they succeeded in the trial court on other grounds and, therefore, had no cause to raise it by motion for a new trial. But as our jurisdiction is not challenged, and as by the decisions cited we seem to have jurisdiction, we have retained the case.

We granted permission to the plaintiffs to amend their abstract of the record by authority of the ruling of the Supreme Court in Lane v. Railway, 132 Mo. 4.

We know of no principle on which the defendants are entitled to recover and the judgment in their favor is therefore reversed and the cause remanded with the direction to the circuit court to enter judgment for the plaintiffs for the surplus proceeds of the sale. *Bland, P. J.*, and *Barclay, J.*, concur.

AUGUST HEMAN, Respondent, v. ELIZABETH A. FARISH et al., Appellants.

St. Louis Court of Appeals, December 23, 1902.

1. **Municipal Corporations:** PUBLIC IMPROVEMENTS: SPECIAL TAXES: SPECIAL TAX BILL: ACTION. Under the charter of the city of St. Louis, article 6, section 25, declaring that the certificate to a tax bill shall be prima facie evidence that the work and material chargéd in the bill have been furnished and that the work has been executed, and of the correctness of the prices, and of the liability of the persons therein named as the owners of the land charged with such bill to pay the same, the admission of a special taxbill in an action thereon establishes a prima facie case in favor of plaintiff.

2. ———: ———: ———: ———: CONSTRUCTION OF CHARTER OF ST. LOUIS. Under the charter of St. Louis, article 6, section 22, requiring the cost of sewers to be assessed on the property of the district, no recovery on a special taxbill for such an improvement can be had without such an assessment.

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3. ———: ———: ———. The St. Louis charter, article 6, section 22, provides that as soon as a district sewer, etc., is fully completed, the board of public improvements shall assess the costs as a special tax against all lots in the district, etc., pro rata, and that the board shall cause to be made out a certified bill of such assessment against each lot in the district, *held*, that where the board, after receiving the sewer commissioner's report, showing the aggregate cost of the construction of a sewer, approved the report, and, having before it a computation of the whole area of the sewer district, referred the matter to the president of the board to make out the special taxbills, which he presented to the board without their being dated or signed, when they were approved by the board, and dated and signed by the president, the approval of the bills constituted an assessment, within the meaning of section 22, article 6 of the charter of the city of St. Louis.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

AFFIRMED.

E. T. Farish for appellant.

(1) The assessment must be made in the manner provided by the statute which authorized the taxation, and a departure in any material part is fatal. Blackwell, Tax Titles (2 Ed.), 255; Dillon, Mun. Corp. (4 Ed.), sec. 769; Lyon v. Alley, 130 U. S. 177; Marx v. Hanthorn, 148 U. S. 172. (2) This is especially true of special assessments for local improvements. 2 Desty, Taxation, p. 1331; Cooley, Taxation (2 Ed.), p. 659; Camerson's Case, 50 N. Y. 502; Sharp v. Spier, 4 Hill 76; Warren v. Grand Haven, 30 Mich. 24; St. Louis v. Rankin, 96 Mo. 497; Henderson v. Casey, 3 Bush. 698. (3) Where a board is required to make the assessment, that duty can not be performed by an individual member or an employee. Metcalfe v. Messenger, 46 Barb. 325; Middleton v. Berlin, 18 Conn. 197; People v. Hager, 49 Cal. 229; Oteri v. Parker, 42 La. Ann. 374; Bank v. Land Co., 73 Me. 404. (4) These liens are creations of law and to establish them every step prescribed by law must be taken. Proceed-

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ings for the enforcement of such liens are *in invitum* and must be strictly construed. Leach v. Cargill, 60 Mo. 316; Kiley v. Oppenheimer, 55 Mo. 374; Church v. People, 179 Ill. 205; Stockton v. Whitmore, 50 Cal. 554.

Hickman P. Rodgers for respondent.

(1) The board of public improvements did make an assessment in conformity with the charter. Heman v. Allen, 156 Mo. 534. (2) The taxbill bore interest at the rate of fifteen per cent per annum from demand. Charter of City of St. Louis, art. 6, sec. 25, R. S. 1899, p. 2513. (3) "The institution of suit on such special taxbill is equivalent to the demand of payment for the determination of the right of penal interest on the taxbill." Syllabus, Bambrick v. Campbell, 37 Mo. App. 460.

BLAND, P. J.—The suit is on a special taxbill issued against a lot of defendants' situated on Vandeventer avenue in the city of St. Louis. The petition is in the usual form. The answer was a general denial. The issues were submitted to the court without a jury. The plaintiff read the taxbill in evidence and rested.

The bill is as follows:

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SPECIAL TAXBILL.

No. 7033. OFFICE OF PRESIDENT OF BOARD OF PUBLIC IMPROVEMENTS.

Elizabeth A. Farish, 3833 Delmar Ave. St. Louis, Jan. 8, 1889.
(Wife of Edward T.) To August Heman (Contractor), Dr.

For constructing sewers in Vandeventer avenue Sewer District No. 1 under authority of ordinances Nos. 14625, 14630, 13076, 13482 and 13596 and under contract No. 1454.

Boundaries.				Description.		Feet Front of Lot.	Feet Deep of Lot.	Area Square Feet in District.	Area Spuare Feet in Lot.	Total cost of sewer.		Rate per 100 Square Feet.	Amount.	
North.	East.	South.	West.	No. of Block.	No. of Lot.					Dolls.	Cents.	Dolls. Cents.	Dolls.	Cents.
Alley.	Williamson.	Delmar ave.	Valle.	3750.		35.0	150.0	16,706,365	5250	243,336	09	1 45 655	76	47
												Int. to 12-4-1891	20	86
													97	33

I hereby certify, that as shown by the certificate of the sewer commissioner, on file in this office, the above mentioned work was done and material furnished by the above mentioned contractor. I further certify that the board of public improvements has assessed the cost of the sewers in said district upon the property-owners thereof according to law; that the rates, or prices and amount, viz: seventy-six—47/100 dollars are correct, and that the person herein named as the owner of the land, and charged with the bill, is liable to pay the same.

R. A. CAMPBELL,
Comptroller.
St. Louis......................

Received payment in full of the above amount,
HENRY FLAD,
President of the Board of Public Improvements.

By section 25, article 6, charter of the city of St. Louis, the certificate to the taxbill is made "prima facie evidence that the work and material charged in such bill shall have been furnished and of the execution of the work, and of the correctness of the rates of prices, amount thereof, and of the liability of the person therein named as the owner of the land charged with such bill to pay the same." The taxbill, therefore, made out a prima facie case in favor of the plaintiff.

Section 22, article 6, of the charter, provides that, "As soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, the said board [referring to the board of public improvements] shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway; and the board shall cause to be made out a certified bill of such assessment against each lot in the district, in the name of the owner thereof."

The taxbill in suit, as shown on its face, was issued on account of a district sewer, in Vandeventer avenue sewer district number one, constructed by plaintiff under a valid contract made with the city in pursuance of the ordinances named in the taxbill.

To overcome the prima facie case made by plaintiff, the defendants offered the following:

"Q. What is your position, if any, in the city government, here? A. Secretary of the board of public improvements.

"Q. As such, you have custody of the records of the board of public improvements? A. I have, sir.

"Q. You have brought them here to court, have you, in obedience to the subpoena? A. Yes, sir.

"Q. I will get you, if you please, to turn to date December 11, 1888, page 356, of volume 16 of the records of the board of public improvements and read there what occurs with reference to the communication of the sewer commissioner to the board of public im-

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provements? A. The sewer commissioners submitted the following report:

"'St.Louis, December 11, 1888.

"'I hereby certify that August Heman has completed the work embraced in his contract number 1454 for the construction of sewer in Vandeventer sewer district number one as shown on the accompanying diagram, and that I have accepted the same in accordance with the specifications and stipulations in his said contract. I have also caused the said work to be carefully measured and the whole cost thereof to be computed according to the terms and prices of his said contract, and I hereby report that the same amounts to $243,336.-09 as shown in detail by the statement hereto attached.

(Signed) "'ROBERT E. MCMATH,
"'Sewer Commissioner.'

"Attached is the computation No. 254 'Computation of the total cost of sewers in Vandeventer sewer district No. 1, constructed by August Heman, under contract No. 1454, and ordinances 13076, 13482, 13625, 14596, and 14630: There is a very long lot of figures there; I do not know whether you want them all read?

"Q. No, sir; and at the bottom is the action of the board. Read that, after those figures. A. 'Referred to the president, with instructions to make out the necessary special taxbills.' That is on page 360, volume 16.

"Q. And the first that you read? A. The first was on page 356, volume 16.

"Q. What you read as being on page 356? A. Excerpt from the records of December 11, 1888.

"Q. Was it a report of the sewer commissioner? A. Report of the sewer commissioner, with the computation of the work done attached.

"Q. By which he certified that August Heman had completed the work embraced in his contract No. 1454 for the construction of sewers in Vandeventer avenue sewer district No. 1, as shown in the accompanying diagram. Is there any diagram here? A. No, sir; the

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diagram is on file in the office, but there is a copy of the computation.

"The Court: What is the description of the lot in controversy here?

"Mr. Rodgers read the description from the taxbill.

"Witness (referring to the record): That is a computation of the whole area in the district; that is to show that the president was authorized and directed to draw the taxbill.

"Mr. Farish: I understand this to be a report, your honor, of the sewer commissioner, signed by Robert E. McMath, sewer commissioner, in which is set forth the brick sewer, dimensions, diameters, etc., pipe sewers, total length of brick and pipe sewers, inlets, manholes, and work computed December 1, 1888, and dimensions of brick sewers, and so on. It commences on page 356, and extends over pages 357, 358, 359, 360, 361 and 362, and after footing up all these amounts and the areas of these different sewers, gives the aggregate amount. This report was referred to the president with instructions to make out the necessary special taxbills. Then that is the end of it (to witness) is it not? A. Yes, sir; that is the end of it, until the taxbill was brought in to be approved.

"Q. I will get you to turn to volume 16, page 433, under date of January 8, 1889, and read the excerpt there, if you please? A. In reference to the president submitting taxbills?

"Q. For Vandeventer avenue, yes, sir. A. The president submitted special taxbills for the construction of the sewer in Vandeventer sewer district No. 1, by August Heman, under contract No. 1454 and ordinances Nos. 13076, 13482, 13625, 14596, 14630, approved by the following votes:

" 'Ayes: Burnett, Holman, Klemm, Murphy, McMath, and President Flad, 6.

" 'Nays: None.'

"Mr. Farish: I submit the foregoing excerpts from the records of the proceeding of the board of

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public improvements with the assertion that that is all the minutes of the board showing any action towards making an assessment of all the property embraced in that sewer district.

"The said records are here produced under a subpoena *duces tecum,* and if there is any other matter appearing thereby which counsel would like to call the court's attention to, he may do so."

This was all the evidence. At the request of defendants, the court made a finding of facts. This finding is as follows:

"The court finds that the taxbill sued on was certified by the president of the board of public improvements, and that his certificate contains the following as a part thereof: 'I further certify that the board of public improvements has assessed the cost of the sewers in said district upon the property-owners thereof according to law; that the rates or prices and amounts, viz., seventy-six and forty-seven hundredths dollars are correct, and that the person herein named as the owner of the land, and charged with the bill, is liable to pay the same.' And the court further finds that in December, 1888, the sewer commissioner computed the whole cost of the Vandeventer avenue and lateral sewers, giving a detailed statement of the cost of each portion of the work, and stating that he had accepted the work and that the aggregate cost was $243,336.09, and reported the same to the board of public improvements, and said report was by the board referred to the president thereof with instructions to make out the necessary taxbills; and afterwards, on January 8, 1889, the president submitted the special taxbills for the construction of sewers in Vandeventer avenue sewer district No. 1 by August Heman, under contract No. 1454, and ordinances numbers 13076, 13482, 14625, 13596, and 14630 to the board for approval, and said taxbills were approved by the following vote: Ayes—Burnett, Holman, McMath, Klemm, and Murphy and President Flad. Nays—None.

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"I further find that the taxbill sued on is one of the foregoing, and is dated January 8, 1889, the same day on which it was submitted to the board and approved by it, and presumptively and in accordance with the certificate of the president of the board, I find it was signed and issued by him after it was approved by the board.

"I further find that no demand was made upon Mrs. Farish for the amount of said taxbill prior to the institution of this suit."

Defendant saved exceptions to the finding of the facts and moved the court to give certain instructions which the court refused to do. The court found the issues for plaintiff, gave judgment for the face of the taxbill ($76.47) and fifteen per cent interest per annum thereon from December 24, 1890, to the date of the rendition of the judgment. Defendants filed a timely motion for new trial. This the court overruled and defendants appealed.

1. The contention of appellants is that the board of public improvements did not make the assessment required by section 22, article 6, of the city charter. As an assessment is the basis of taxation, the special taxbill sued on is void unless grounded on a valid assessment made by the tribunal to whom the power to make the assessment is delegated by the charter. Collins v. Trotter, 81 Mo. l. c. 283; The St. Louis & S. F. Ry. Co., 114 Mo. 1; St. Louis v. Wenneker, 145 Mo. 230; State v. Railroad Co., 149 Mo. 635.

The scheme of assessment provided by the charter for raising money to pay for the construction of district sewers is to divide the cost of the construction of the sewer by the whole number of square feet of ground in the sewer district, excluding public highways, and thus find the percentage with which each square foot of ground should be charged. This percentage forms the basis of the assessment and its ascertainment is to fix or determine the rate of special taxes.

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The board of public improvements is not required by the charter or by any ordinance to list the lots in the sewer district or to make out any form of tax list. The charter provides simply that the board shall make the assessment, that is, ascertain the rate of taxation and the portion of cost of construction each lot shall bear after having approved the construction and cost of construction. The board had before it the report of the sewer commissioner showing in detail and in the aggregate the entire cost of construction. This report is approved. It had also a computation of the whole area of the sewer district, excluding public highways, and presumably the area of each lot within the district. The ascertainment of the rate of taxation, therefore, and of the amount with which each lot should be assessed were matters of mathematical calculation which would take considerable time to work out. Had the board directed its president or its clerk to make these calculations and ascertain the amount of taxes against each lot and then approved the work and directed its president to make out taxbills from such list, it could not be contended that the board did not assess the lots in advance of its order to the president to make out the taxbills. Yet this is substantially what was done. The taxbills as made out and presented to the board are only taxbills in form; for they were neither dated nor signed. Collectively they showed all the lots in the district, the area of each lot, the rate of taxation and the taxes to be assessed against each lot and the aggregate of taxes the assessment would raise. In this condition they were submitted to the board and by it approved. They did not become taxbills in fact until after the order of the board approving them was made, as is shown by the findings of the court. When approved, they were but descriptions of each lot to be assessed with the rate of taxation and the amount of taxes stated opposite the description of the lot. They did not become taxbills, within the meaning of section 24, article 6, of the charter, until after they were dated and signed by the president of the board. We think, therefore, that the resolution of the

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board approving the taxbills as presented by the president of the board, prior to their being dated and signed and before they took effect as taxbills, was in form and substance an assessment within the meaning of section 22, article 6, of the charter, in allowing interest, the Court followed Eyermann v. Provenchere, 15 Mo. App. 256, and affirm the judgment. *Barclay* and *Goode, JJ.*, concur.

MOUND CITY CONSTRUCTION COMPANY, Respondent, v. FANNIE F. MACGURN et al., Appellants.

St. Louis Court of Appeals, December 23, 1902.

Special Assessments: PUBLIC IMPROVEMENTS: ADJACENT PROPERTY: LIMIT OF ASSESSMENT: CHARTER: CONSTRUCTION: STATUTORY CONSTRUCTION. By the charter of St. Louis of 1876, "adjacent property" is made the subject of special assessments for improvements on public streets. Article 6, section 18, provides that, whenever special taxes to be assessed against "any property" shall amount to more than twenty-five per cent of the assessed value of said property, the excess over twenty-five per cent shall be paid out of the general revenue. General revenue laws of 1872, section 8, in force at the time of the adoption of the charter provided that the term "real property" or "lot," whenever used in the act, should include all improvements thereon: *Held*, that since the general law for assessment, to which the charter refers, makes a unit of the lot and its improvements, and since exemption privileges are to be strictly construed, the assessed valuation of the "adjacent property," beyond twenty-five per cent of which the special taxation might not go, included both land and improvements.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

AFFIRMED.

Daniel Dillon for appellants.

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(1) There is but one question in this case, and that arises on the pleadings, and admitted facts set out in a stipulation filed in the trial court. Section 18, article 6, of the charter of the city of St. Louis provides, in substance, that the lots abutting a street shall not be charged for the construction of such street in excess of twenty-five per cent of the assessed value of said property, calculating a depth of such property to 150 feet. And the question to be determined in this case is whether or not, in determining the amount of twenty-five per cent. of the assessed value of any lot, the value of the building on the lot is to be taken into account or considered. (2) The injustice of taking the improvements into account for a purpose of this kind is clearly stated in Snow v. Fitchburg, 136 Mass. 183, where this language is used: "It would be manifestly unjust in making assessment for a sewer, to value a lot worth $500 with a house on it worth $5,000 at $5,500, and to value an adjoining lot of the same size and value, but vacant, at $500, when within a few months the owner of the vacant lot might build a house upon it of greater value than the house on the adjoining lot and require and enjoy equal facilities for draining." This language is equally applicable to the construction of a street, where each lotowner would have the same use and benefit of the street after it was constructed. Brewing v. Springfield, 97 Mass. 152; City of Boston v. Shawl, 1 Met. 138; Dovner v. Boston, 7 Cush. 281; Cooley on Taxation (2 Ed.), 649; 25 Am. and Eng. Ency. of Law, p. 526.

George W. Lubke for respondent.

(1) Whatever doubt there might be on this question is settled by the acts of the General Assembly of Missouri. It is provided by section 8, of the act approved March 30, 1872, (Laws 1872, p. 85) and by section 1, of the act approved, March 15, 1883, (amending section 6664, Revised Statutes 1879) Laws 1883, p. 135, as follows: "The term 'real property,' 'real estate,'

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'land' or 'lot' wherever used in this chapter [the chapter here referred to is as to the assessment of the revenue] shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures of whatsoever kind thereon, all shot-towers and all machinery connected therewith, all gristmills, sawmills (except portable mills of every description), oil wells, tobacco, hemp and cotton factories, tobacco stemmeries, rope-walks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool-carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass or other foundries, and all rights and privileges belonging, or in anywise pertaining thereto, except where the same may be otherwise denominated by this chapter,'' etc.

BARCLAY, J.—We adopt the statement submitted here by the able representative of defendants, appellants, which is an entirely fair presentation of the facts on which this appeal must be decided, as follows:

The plaintiff's cause of action is based on a special taxbill issued under the provisions of the charter of the city of St. Louis.

The petition alleged that defendants were owners of a lot of ground in the city of St. Louis, fronting forty feet on Maple avenue, and that an ordinance of the municipal assembly of said city was passed, providing for the construction of the street in front of this property, and that in pursuance to said ordinance a contract was let to plaintiff to construct said street, and that said street was constructed in accordance with said contract, and that when the work was completed there was assessed against said lot of defendants, as its part of said costs, $691.49, for which a special taxbill was issued against said lot; that payment of said bill was demanded on January 11, 1899; and that said lot of ground was assessed for general taxation in the years

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1897 and 1898 at $4,200. The prayer was for judgment for $691.49 with interest at the rate of fifteen per cent per annum from January 11, 1899, and that the same be decreed a lien on said lot. In the amended answer defendants admitted that they were the owners of said lot of ground as alleged in the petition. This answer then alleged that in the years 1897 and 1898 said lot of ground was assessed for general taxation at $1,000, and the improvements on same consisting of a house or building, was assessed at $3,200, and that under the provisions of the charter of the city of St. Louis, said lot of ground could not be charged with any lien for the construction of said street for any sum exceeding twenty-five per cent on the value of said ground, as assessed and valued for general taxation, and that the value of the buildings on said lot could not be considered or taken into account in determining the assessed value of said lot for the purpose of ascertaining the amount of said twenty-five per cent. The answer further alleged that at the time of and before demand of payment of said bill defendants had tendered to plaintiff $250 in payment of said bill, which was refused, and that defendants have ever been ready to pay said $250, and now bring it into court and tender it to plaintiff.

The reply admitted that, for the years 1897 and 1898, the assessments of said lots of ground for general taxation showed an aggregate assessment of $4,200, made up of $1,000 as the value of the ground, and $3,200 as the value of the improvements. And that, on November 11, 1899, defendants tendered plaintiff $250 in payment of said special taxbill. On February 24, 1902, a stipulation was filed submitting the case on said pleadings, and agreeing that the additional facts stated in said reply were true. On June 20, 1902, and during the June term, 1902, of said court, the court rendered a final judgment for $1,048.49, and making the same a special tax lien on said lot. Within four days thereafter, and during the said June term, defendants

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filed a motion for a new trial, for these reasons, among others: First, that under the pleadings and said stipulation, the court should have found and decided that said lot of ground mentioned in the petition could not have been assessed or charged with any lien for said construction of Hamilton avenue in any sum in excess of $250. And that, under the pleadings and said stipulation, the findings of the court were erroneous and unwarranted, and contrary to law. On July 15. 1902. and during said June term of said court. the court overruled said motion for a new trial and defendants then and there duly excepted. And, on said July 15. the circuit court granted defendants an appeal to the St. Louis Court of Appeals.

The appeal was afterwards perfected.

The only question to be determined, as tersely summarized by the learned counsel for appellants, is, "whether or not, in determining the amount of the twenty-five per cent of the assessed value of any lot, the value of the building on the lot is to be taken into account or considered."

1. The principal parts of the written law which appear to bear upon the facts in judgment are the following:

Section 18 of article 6 of the charter of 1876 of the city of St. Louis provides:

"Whenever the estimated special taxes to be assessed against any property shall in the aggregate amount to more than twenty-five per cent of the assessed value of said property, calculating a depth to such property of one hundred and fifty feet, then the assembly shall provide out of the general revenue for the payment of the amount in excess of the said twenty-five per cent."

Section 25 of the same article of the St. Louis charter declares:

"Sec. 25. Said taxbill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the

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contractor, as any other claim in any court of competent jurisdiction, with interest," etc. (R. S. 1899, p. 2513, sec. 25).

General revenue law of 1872 (Laws 1872, p. 85):

"Sec. 8. The term 'real property,' 'real estate,' 'land,' or 'lot,' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatever kind thereon, and all rights and privileges belonging or in anywise pertaining thereto, except where the same may be otherwise denominated by this act."

The statute law in force when the special tax here in question was levied is substantially as it was in 1872, so far as it bears upon the issues of the case at bar. R. S. 1899, sec. 9123.

The charter of St. Louis went into operation in 1876, and the law of 1872 above quoted as to assessments of real property was then in force.

1. The substantial question before this court is, what property was intended by the language which we find in section 18 of the sixth article of the St. Louis charter of 1876, forbidding the assessment of special taxes against "any property" for adjacent improvements beyond an amount equal to "twenty-five per cent of the assessed value of said property?" Defendants contend that the word "property," means the land alone and does not include any building thereon.

It can not be denied (and it is conceded by the learned counsel for appellants) that the word "property" often includes buildings thereon, according to the definition of that word by Worcester, Webster and Bouvier (Rawle's Ed.) and that the term "real property" includes not merely land but whatever is permanently affixed thereto. The contention of appellants is that the term "property" was not intended to possess so wide a meaning in the connection in which it appears

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in that part of the charter which must now be construed.

We think, however, that the language of that section can not be properly severed from the terms of the General Revenue Act of 1872, above quoted, which was part of the law of Missouri when the charter of St. Louis of 1876 was adopted. For the purposes of general taxation the land and the buildings thereon are treated by our law as a unit. It matters not that by custom in the city of St. Louis the assessor separately mentions the value of the improvements. The taxation itself is upon the lot together with the permanent structures thereon, despite the separate statement of the elements which go to make up the final result of the assessment. Moreover, the reason and spirit of the provisions limiting special taxes appear to us to require the entire permanent realty to be estimated in apportioning the special taxes for adjacent improvements.

The precise words to be interpreted are "adjacent property." They are used to point out the tax assessment, which shall form the basis of calculation of the twenty-five per cent limit beyond which the private owner shall not be taxed, at any one time, for improvements on the neighboring public street. Undoubtedly there is much justice in the argument of the court in Snow v. Fitchburg, 136 Mass. 183, which appellants invoke to show that the land without the buildings should alone be taken into account in fixing the high-water mark of a special taxbill. But we think that the condition of our own State law, at the time when the charter of St. Louis was adopted in 1876, reveals the purpose to establish a different rule from that declared in the Massachusetts decision cited.

It must not be overlooked that the words which come under construction in the present case are simply employed to define the limit to which the particular taxation shall go. The record does not show how the special tax was apportioned. As the bill itself, however, is prima facie evidence of liability (R. S. 1899,

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p. 2513, sec. 25) we must assume that the mode of assessment was correct in so far as it has not been challenged. But the method in use has been described in the Supreme Court reports and is well known as the "front-foot" rule. Farrar v. St. Louis, 80 Mo. 393. By that rule the total cost is ascertained as well as the total frontage of the property chargeable with the special tax, then the former item is divided by the number of feet of frontage and the rate per foot is thus ascertained; each lot is then assessed by multiplying the rate per foot of cost by the front feet it exhibits, and the total is the assessment against each lot. The twenty-five per cent limit applies to each lot, and not to the aggregate of the assessments. Allen v. Krenning, 23 Mo. 561. The front-foot rule does not take account of anything but frontage and in support of the result reached in the trial court we should if necessary assume that it was applied in the case at bar, as we doubt not it was. The cost of the improvement should be taken to have been apportioned without regard to the buildings on any lot; but when it comes to determine the maximum tax to be borne by any one piece, the assessed value for general taxation (including the buildings thereon, which must for that purpose be included) is considered, and if the aggregate amount assessed against any particular property is more than twenty-five per cent of that assessed value (as intended by the charter) "then the assembly shall provide out of the general revenue for the payment of the amount in excess of said twenty-five per cent." R. S. 1899, p. 2512, sec. 18. The inclusion, therefore, of the value of the buildings has nothing to do with the question of apportionment of the special tax, except to define the limit which the tax may reach, or, in other words, to ascertain what part of the tax, regularly chargeable against a particular lot, shall be borne by the city. The twenty-five per cent limitation can not have the effect to increase the tax legitimately assessable against any one lot according to the "front-foot" rule.

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The clause under construction is substantially a provision in the nature of an exemption and it should be strictly construed in favor of the taxing power. Allen v. Krenning, 23 Mo. App. (St. L.) 561.

It can not be said that the construction of the words "adjacent property" in the section of the charter under discussion is entirely free of doubt. The able and ingenious argument of counsel herein leading to a conclusion different from our own has much persuasive force. But when we notice that the general law for assessment of realty (to which the charter obviously refers) makes a unit of the lot and the building thereon, it seems that there is no just alternative but to treat them as a unit in ascertaining the proper limit of the peculiar exemption from special taxation which is here in view.

The judgment is affirmed. *Bland, P. J.*, concurs; *Goode, J.*, not sitting.

JOHN MITCHELL, etc., Respondent, v. WABASH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Evidence:** CONSTRUCTION OF IOWA CODE. In the case at bar, the evidence shows that the respondent was not engaged in the operation of a railway, but in the reconstruction of an old and theretofore abandoned railway track, preparatory to a resumption of its use as a railway, and the provisions of section 2071 of the Iowa Code do not apply to the case.

2. **Master and Servant:** SAFE APPLIANCES. It is the duty of the master to furnish the servant reasonably safe appliances and tools with which to work.

3. **Practice Trial:** PRACTICE, APPELLATE. Where a case is tried on the theory that appellant was liable if it furnished respondent with a defective car, the appellant will not be permitted on appeal to insist that the respondent should have been held to strict proof of the allegation in the petition that appellant built the defective car at its own shops.

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4. ———: ———: PARTIES ARE BOUND BY ACTION IN TRIAL COURT. Where the instructions for respondent told the jury in effect that if a car was made of brash and brittle wood and was not reasonably safe for the purposes for which it was long used when loaded with an ordinary load, and for this cause broke down and injured the employee of the appellant, then the fact that it was overloaded did not absolve appellant from liability, and counter to this the jury were instructed for appellant, that if the car was reasonably safe when not overloaded, but was overloaded and broke down from this cause, that respondent could not recover: *Held*, that, appellant adopted respondent's theory of the law by its counter instruction and can not be heard in an appellate court to complain of the error, if it be error, which it adopted and acted upon at the trial.

5. **Excessive Damages**: VERDICT, WHEN SET ASIDE: PASSIVE, PREJUDICE: PRACTICE, APPELLATE. Where a trial judge refuses to set aside a verdict which is claimed to be excessive, the appellate court will affirm its action unless it is manifest that the jury were actuated by passion or prejudice.

Appeal from Audrain Circuit Court.—*Hon. Elliott M. Hughes,* Judge.

AFFIRMED.

STATEMENT OF THE CASE.

The substantive allegations of the amended petition —on which the cause was tried—are that plaintiff in April, 1899, was employed by the defendant as a common laborer; that he was put to work with other employees of defendant on the reconstruction of an old and abandoned piece of railroad near Bussey in the State of Iowa; that he was inexperienced in such work; that after having worked on the reconstruction of the road for about five days, he was directed by the section foreman, along with eight or ten other inexperienced laborers, to take a push car and move some old steel rails; that in obedience to the order the push car was loaded with the old rails and pushed along for a short distance, when it broke down and one of the rails fell upon the plaintiff's ankle and severely and permanently injured it. The negligence alleged is that the defendant

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constructed the push car out of brash, unsound and insufficient timber, and that from the inexperience of the employees put to load it, and by the permission of the section foreman, it was overloaded; that it broke down by reason of faulty construction.

The answer alleged that under the laws of Iowa, the plaintiff and other laborers working with him and the section boss were fellow-servants; alleged that the injury, if any, to plaintiff was occasioned by the negligence of plaintiff and his fellow-servants in overloading the push car; alleged that prior and subsequent to the injury, the plaintiff was afflicted with rheumatism and that his injuries have been complicated on account of said disease, and not on account of the injury, if any, received by the breaking down of the car, and denied generally all other allegations not specifically admitted. The reply was a general denial.

Plaintiff's evidence tended to prove that he was raised on a farm, was about nineteen years old at the time of the accident, and had never before worked on a railroad; that he had worked five or six days on the road for defendant before he was injured, but had not used a push car before the injury; that on the morning of the injury, he with eight or ten other young men employed by defendant, were told by the section boss to take a push car and move some old steel rails that had been torn up and scattered along the roadway; that the push car they were told to use looked like a new car and was painted; that he did not inspect the car; that he and his co-employees took the car, pushed it to the old rails and loaded it with them; that in order to move the car it had to be pushed along the track by the men, some at the end and some at the side of the car; that he took a position at the side of the car and was helping to push it along the track. When it had been moved a short distance, one of the sills which supported the platform or bottom of the car broke in two and some of the rails fell off, one striking plaintiff on the ankle and inflicting the injury; that the sill that broke was a light, brittle piece of wood, either partially decayed or taken

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from an old dying tree, and was unfit for the purpose for which it was used, and would bear only from one-third to one-fourth the weight of a sound piece of wood of the same size, and that its defects could have been easily detected from its weight, or from boring into it or working it or from inspection; that there were twenty rails on the car when it broke down and that sixteen of such rails was an ordinary load for a push car; that plaintiff's fellow-servants who assisted in loading the car were inexperienced in loading such cars and that the section boss gave no direction as to the number of rails that should be loaded on the car, but was near by when it was loaded.

In respect to the making of the car, John Mitchell (another person than the plaintiff, but testifying as a witness for the plaintiff) swore that the defendant had all of its push cars built at Moberly, Missouri, and that he built them and that he supposed he built the car that broke down, but did not know as he was not at Bussey when, or after the car broke down; that he built push cars that were sent by defendant to Iowa to be used in the reconstruction of that piece of road; that the defendant had two push cars that he did not construct, but he did not know where they were.

In respect to the injury, the evidence is that plaintiff's ankle was lacerated, bruised and badly sprained; that he was treated in the defendant's hospital at Moberly, Missouri, for five or six months, and was lame when he left the hospital and had continued lame; that the sprained ankle was larger than the other one; that it will take a long time to get entirely well and possibly the injury is permanent, and that there was evidence of injury to the ankle bone, and that the injury prevents the plaintiff from walking in the natural way, and that the joint will always be weaker on account of the injury and more liable to disease and easier hurt.

On the part of defendant, the evidence of the physician who treated plaintiff while in the hospital was, that no bones were broken; that the ankle was lacerated and

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seriously sprained; that a short time after he entered the hospital a rheumatic condition developed in plaintiff's wrists and elbow and involved his ankle joint and retarded his recovery from the injury; that sprains of the ankle joint are of a serious character and that it takes time for recovery, but will get well if no bones are crushed, and that there was no reason why plaintiff should not recover from the injury; that the character of rheumatism that plaintiff developed would retard his recovery from the injury; that after the injury the plaintiff had attended dancing parties in his neighborhood and had participated in the dancing.

Defendant put in evidence section 2071 of 1897, Iowa Code. The decisions of the Iowa Supreme Court in Malone v. R. R., 65 Iowa 417; Smith v. R. R., 59 Iowa 73; R. R. v. Foley, 64 Iowa 644, and Matson v. R. R., 68 Iowa 22.

For plaintiff the court gave the following instructions:

"By the term negligence used in these instructions, is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.

"The jury are instructed that 'ordinary care' as mentioned in these instructions, depends upon the circumstances and facts of each particular case or situation with reference to which the term is used. It is such care as a person of ordinary prudence and caution would usually exercise in the same situation and circumstances.

"The court instructs the jury that under the evidence in this cause John Mitchell is a minor, and that Thomas Mitchell was duly appointed the next friend of the said John Mitchell.

"The court instructs the jury that plaintiff had a right to assume that the car furnished for his use by the defendant was reasonably safe and sufficient for the purpose of handling steel rails, and it was not incumbent on plaintiff to search for hidden defects in said

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car, but it was the duty of the defendant to use reasonable care, diligence or caution to have said car in a reasonably safe condition for use.

"If you believe from the evidence that the car mentioned in the evidence and in the petition was, at the time it is alleged the plaintiff was injured, in a defective condition and not reasonably safe, and that the agents or servants of defendant, whose duty it was to furnish, inspect or repair such cars, knew or by the exercise of reasonable diligence might have known the condition of said car, then such knowledge is knowledge of defendant, and such neglect or failure to obtain such knowledge is the negligence or failure of defendant.

"The court instructs the jury that if you believe from the evidence that on or about the 18th day of August, 1899, John Mitchell, the plaintiff, was in the employ of defendant, and that while in the discharge of his duties as such employee he was, without carelessness on his part which contributed directly thereto, struck and injured by a rail falling from defendant's car because said car was weak, defective and not reasonably safe, then your verdict will be for plaintiff, if you believe the weak, defective and unsafe condition of said car was unknown to plaintiff and could not have been known by ordinary care and caution on his part, and that said condition of said car was known to defendant or might have been known to defendant by reasonable diligence and inspection on its part.

"The court instructs the jury that it is the duty of defendant to supply its employees with cars in a reasonably safe condition, and it is the duty of said defendant in constructing its cars for the use of its employees to exercise ordinary care and skill in constructing the same, and in selecting the materials with which to construct and build said cars; and in this cause if you believe defendant failed or neglected to discharge these duties above specified, and in consequence of such neglect the car broke down and a rail on said car fell upon and injured the plaintiff while the said plaintiff was in

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the exercise of ordinary care, then the verdict will be for the plaintiff.

"The court instructs the jury that if you believe from the evidence that on or about the 19th day of August, 1899, plaintiff was in the employ of defendant and was ordered by the foreman of defendant to lift and place upon a truck or push car, used by defendant, a number of steel rails, and while so employed, and whilst said car was being loaded and pushed over defendant's track, said car and truck gave way, broke and fell, causing a steel rail to fall from said car upon the plaintiff and injured him, then your verdict will be for the plaintiff, if you believe from the evidence that said push car gave way and fell because the same was defective and constructed of improper, unsuitable and insufficient material, and not reasonably safe for an ordinary load, and that defendant knew or might, by the proper inspection or by the exercise of ordinary care, have discovered and known the condition of the car.

"The court instructs the jury that if you believe from the evidence that the rubble car was made of brash, brittle, weak and unsuitable material and not reasonably safe for the purposes for which it was being used, when loaded with an ordinary load, and for this cause the said car broke, then the fact (if it be a fact) that it was overloaded at the time it broke down does not absolve the defendant from liability.

"The jury are instructed that if you find for plaintiff you will, in assessing the damages, take into consideration the physical condition he was in before the injuries in question, the physical pain and mental anguish he has suffered occasioned by said injuries, and the physical pain and mental anguish, if any, you believe from the evidence he is likely to suffer in the future because of said injuries; and in addition to this, you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood after his majority—to-wit, after he arrives at the age of twenty-one years—will be impaired by said injuries,

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and you will return a verdict for him in such sum as you believe to be just and reasonable, not exceeding five thousand dollars."

To the giving of which instruction defendant objected and excepted.

And for the defendant the court gave the following:

"The court instructs the jury that there is no evidence in this case that on account of plaintiff's infancy and inexperience he was unable to perform the service required of him in defendant's employment, or that the men employed and working with him were incompetent to do the work, or that the defendant or its agents were negligent in the employment of any of the men working with the plaintiff; and you are further instructed that the nature of the work done by plaintiff did not require of defendant any instruction from it in his duties.

"The court instructs the jury that the defendant is not an insurer of the safety of plaintiff in and about his work, and that defendant was not required to furnish an absolutely safe car; that all defendant is required to do is to furnish a reasonably safe car for the uses for which it is to be used when properly loaded and not overloaded, and if you find that said car was reasonably safe when properly used and when not overloaded, then plaintiff can not recover.

"The court instructs the jury that you can not presume or infer negligence, nor that the car was defective, from the fact that it broke down and that plaintiff was thereby injured; but plaintiff must prove to your reasonable satisfaction, by the greater weight of evidence, that said car, when under a sufficient load of rails, was not safe for the purposes for which it was used, and that plaintiff was injured in consequence thereof.

"The court instructs the jury that although you may believe from the evidence in the case that said timber which broke was of brash or brittle wood, yet if such condition could not have been discovered by ordi-

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nary inspection on the part of defendant and its agents, and if you find this was the only defect in said car, then defendant is entitled to a verdict.

"The court instructs the jury that before the plaintiff is entitled to recover in this cause he must establish, by the greater weight of the evidence given in the case, that he was injured by reason of the negligence of the defendant in failing to furnish him a reasonably safe car upon which to haul rails when not overloaded, and if he has failed to do this, then the verdict must be for the defendant.

"The court instructs the jury that if you find that said car was reasonably safe for the purpose for which it was used when properly loaded, and that said car broke and injured plaintiff as result of being overloaded by plaintiff and fellow-employees, then the verdict must be for the defendant.

"The court instructs the jury that although you may believe from the evidence in the case that said car contained a piece of brittle or brash wood, yet if you find that it was reasonably safe for an ordinary load and that plaintiff or his fellow-workmen overloaded it and as a result of the overloading it broke and plaintiff was thereby injured, then he can not recover and you will return a verdict for the defendant.

"The jury are instructed that under the law of the State of Iowa in evidence in this case, the plaintiff and his boss or foreman, Tilger, were fellow-servants, and although you may find from the evidence in this case that the push car in question was overloaded by the order of said Tilger, and plaintiff was injured thereby, yet you are further instructed that defendant is not liable in this action by reason of said order of said Tilger which resulted in the overloading of said car to plaintiff's injury.

"If the jury find that the car in question was reasonably safe for the purposes of hauling rails thereon when not overloaded, and that plaintiff with his fellow-workmen did overload said car, by reason of which it

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broke, causing the rails to fall therefrom and strike and injure plaintiff, then the verdict must be for the defendant.

"The court instructs the jury that if they find from the evidence in this case that at the time and place here in question the plaintiff, together with the defendant's section foreman and other employees of the defendant then and there working with said foreman, undertook to load rails upon a push car more than said car was built to carry, if constructed with ordinary care as to the material thereof, and that after said rails were placed upon said car by plaintiff and said foreman and said section men, the weight of said rails broke the car, by reason of overloading said car, whereby said rails then and there fell and injured plaintiff, then they are instructed that the plaintiff can not recover in this action, and your verdict must be for the defendant.

"The court instructs the jury that the defendant is not liable for any damage to plaintiff on account of rheumatism or by reason of any neglect to give the injury proper treatment, or on account of improper use of the injured limb; and if you should find for the plaintiff, it is your duty to allow him only for injury and damage such as is directly due to the hurt received from the rails striking him, and not for what is due to any other cause."

And refused the following:

"The court instructs the jury that under all the evidence and the pleadings in the case the plaintiff can not recover.

"1. The court instructs the jury that there is no evidence in this case that the defendant built the car which was being used by plaintiff at the time of his injury, nor is there sufficient facts proven from which you can infer that defendant built the car.

"2. The court instructs the jury that it devolves upon the plaintiff in this case to prove: First, that the defendant made the car in question; second, that it was constructed of weak and defective material; third, that it was not reasonably safe when used under an ordi-

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nary load; and, fourth, that plaintiff was injured as the result of said car being defective, and unless plaintiff has done so, you will return a verdict for the defendant. On the other hand, if you find that said car was defective, and that such defects could be discovered by an ordinary inspection of the same by persons working with the car, and that plaintiff and those with whom he worked, including his boss or foreman, did not discover such defects, when they could have done so, and as a result thereof plaintiff was injured, then plaintiff can not recover."

To which refusal defendant objected and excepted.

The jury found for plaintiff and assessed his damages at $2,500. A motion for new trial was filed and overruled. Defendant appealed.

George S. Grover and *George Robertson* for appellant.

(1) The demurrer to the evidence should have been sustained. 3 Elliott on Railroads, secs. 1309 and 1366, pp. 2064 and 2133; Railroad v. Mase, 63 Fed. Rep. 114; Bailey on Master and Servant, pp. 5, 17, 27, 31, 180, 202, 913, 914; Schroeder v. Railroad, 41 Iowa 344. (2) The instructions given are in hopeless conflict with each other. Conway v. Railroad, 50 Iowa 465; Hawes v. Railway, 64 Iowa 315. (3) The verdict is so excessive as to imply the existence of prejudice and passion on the part of the jury.

P. H. Cullen and *E. S. Gantt* for respondent.

(1) It is universally held by all our courts that "to fully effectuate the objects contemplated by the adoption of the code, it is essential that the court keep in mind these principles and apply them to particular cases in a spirit entirely in accord with the intent of this legislation. It is evident that a pleading should not now be construed most strongly against the pleader. Its language should be taken in its plain and ordinary

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meaning, and such an interpretation given it as fairly appears to have been intended by its author." Stillwell v. Ham, 97 Mo. 585; Warwick v. Baker, 41 Mo. App. 439; Ogelsby v. Mo. Pac., 150 Mo. 154; Loehr v. Murphy, 45 Mo. App. 519; Bricker v. Stone, 47 Mo. App. 530. (2) This principle was applied to a very similar state of facts in Ogelsby's case, supra. Applying these rules to the petition in the case at bar and it simply charges the defendant with negligence in furnishing to plaintiff a defective car. That is the gravamen of the complaint; the one substantive, issuable fact upon which legal liability is predicated. The allegation that defendant "built and caused to be built" the car, is an error or defect in the pleading, which the court "shall in every stage of the proceedings disregard" by the imperative command of the statute. Sec. 659, R. S. 1899.

BLAND, P. J.—It is contended by appellant that its instruction in the nature of a demurrer to the evidence should have been given. The court so instructed, and it is conceded that appellant's liability is governed by the laws of Iowa, the State where the accident occurred. Respondent pleaded specially section 2071 of the Iowa Code. That section reads as follows: "Every corporation operating a railroad, shall be liable for all damages sustained by any person, including employees of such corporation in consequence of the neglect of the agents, or by any mismanagement of the engineers, or other employees thereof; and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any such railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The evidence shows that the respondent was not engaged in the operation of a railway, but in the reconstruction of an old and theretofore abandoned railway track, preparatory to a resumption of its use as a rail-

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way. His employment was not to assist in the operation of a railway and his injury was not inflicted by any act of commission or omission of any agent, engineer or employee of the appellant, in any manner connected with the use and operation of a railway. Schroeder v. R. R., 41 Iowa 345; Smith v. R. R., 59 Iowa 73. The fellow-servant act (section 2071, supra) did not furnish the respondent the relief therein provided, nor was the cause tried upon the theory that it came within the provision of that act. In respect to the alleged negligence of the foreman or section boss in permitting the car to be overloaded and in failing to instruct the inexperienced men engaged in the loading of the car, how many rails to put on the car as a proper load, it seems from the Iowa cases that the relation of a laborer and boss or foreman, engaged in the same general service in that State, is that of fellow-servants. In Peterson v. Whitebreast Coal & Mining Company, 50 Iowa 673, the plaintiff was injured through the negligence of Watson, a foreman or boss. The court said: "It does not appear what was the extent of his (Watson's) authority, except as can be inferred from the terms used in defining it. Certain it is that it is not averred he had authority to discharge other employees or that the defendant was negligent in employing him. . . . It makes no difference if the employee receiving the injury is inferior in grade to the one by whose negligence the injury was caused," and held the company not liable for Watson's negligence. The same rule is announced in Foley v. R. R., 64 Iowa 644; Wilson v. R. R., 77 Iowa 429, and Hathaway v. R. R., 92 Iowa 337.

The allegation in the petition is that the appellant was negligent in employing inexperienced men to load and push the car. The evidence is that Tilger was the boss or foreman, under whom the respondent and the other employees who loaded the car worked, and that the car was loaded by his direction and that he was nearby when it was loaded, but there is not a ray of testimony that he was an inexperienced or incompetent man to perform the duty assigned him by appellant.

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It was also contended by appellant that the only evidence that the car was defective was the fact that it broke down when overloaded. Standing alone this would not be sufficient proof to authorize a recovery. O'Connor v. R. R., 83 Iowa 105; Kuhn v. R. R., 70 Iowa 566. But there is evidence that the car was made of faulty and insufficient material. A section of the sill of the car which broke and caused the rail to fall upon respondent was produced in court on the trial and submitted to a number of experienced and expert persons as to quality and strength of this particular sill, all of whom testified that it was brittle, had been cut from an old or decaying tree, did not possess more than from one-third to one-fourth the resisting power of a good and sound sill of the same size, and that it was unfit for a sill in a push car. The evidence is all one way, that the car was constructed with faulty material, and that the defect was not perceptible to ordinary observation—the defective sill having been painted on the outside so that the kind and character of the wood was not open to ordinary observation. The law in Iowa, as elsewhere, being that it is the duty of the master to furnish the servants reasonably safe appliances and tools with which to work (Burns v. R. R., 69 Iowa 450; Cooper v. R. R., 44 Iowa 136; Finch v. Ins. Co., 84 Iowa 321), we hold that there was evidence that the appellant had failed to perform this duty and that the case was properly submitted to the jury.

II. It is alleged in the petition that the appellant built and caused to be built, the car at its own shops and furnished it to respondent and other employees to be used in the reconstruction of the railway. Appellant contends that the respondent should be held to strict proof of this allegation that it built the car.

The instructions asked by both parties and given by the court, show that the case was submitted to the jury on the theory that it was the duty of the appellant to furnish the respondent with a reasonably safe push car. For the respondent the jury were instructed that it was the appellant's duty to select the proper mater-

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ials out of which to construct the car and if it did not build the car, that it was its duty to make a reasonable inspection of it before putting it in the hands of the respondent. The court instructed the jury at the request of appellant, that if any defective condition of the car could not be discovered by an inspection on the part of appellant or its agents, plaintiff could not recover.

Having tried the case on the theory that appellant was liable if it negligently furnished respondent with a defective car, the appellant will not be permitted on appeal to insist that the respondent should have been held to strict proof of the allegation that appellant built the car at its own shops, the law being well settled that on appeal parties litigant may be confined to the cause of action they adopted on the trial. Hill v. Meyer Bros. Drug Co., 140 Mo. 433; Stewart v. Outhwaite, 141 Mo. 562; Pope v. Ramsey, 78 Mo. App. (K. C.) 157.

John Mitchell testified that he had been in appellant's employ for thirteen years and had charge of its car shops at Moberly, Missouri, and built appellant's push cars, and "supposed he made the car in question," but could not say positively, as he was not at Bussey where the accident occurred; that cars built at appellant's shops were furnished for that division. While this is not direct positive evidence that the car was built by appellant, it was evidence tending to prove that fact, and as appellant did not, as was in its power to do, offer any evidence to show where the car was actually built, or any evidence to show that the car was not built at its shops, it was sufficient to warrant the court in submitting that issue to the jury and to warrant the jury in finding as a fact that defendant did build the car.

III. The appellant contends that the court erred in authorizing a recovery, even though the car was overloaded. The instructions for respondent told the jury in effect that if the car was made of brash and brittle wood and was not reasonably safe for the purposes for which it was being used when loaded with an ordinary load, and for this cause broke down, then the fact that it was overloaded did not absolve appellant from lia-

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bility. Counter to this the jury were instructed for appellant, that if the car was reasonably safe when not overloaded, but was overloaded and broke down from this cause, that respondent could not recover. Appellant adopted respondent's theory of the law by its counter instruction and can not now be heard to complain of the error, if it be an error, which it adopted and acted upon at the trial. Berkson v. K C. Cable Co., 144 Mo. 211; Dunlop v. Griffith, 146 Mo. 288; Frankenthal v. Guardian Ins. Co., 76 Mo. App. 15; Marks v. Davis, 72 Mo. App. 557. But we do not hold the instruction to be erroneous. In effect it declared the law to be, that if the car was constructed of such weak and faulty wood that it would not bear up under an ordinary load, and that if appellant was guilty of negligence in furnishing it in its weak and unsafe condition and that it broke down from its inherent weakness, but not from being overloaded, then the respondent and his co-employees were not guilty of such contributory negligence as to bar a recovery. The instruction for appellant, on the other hand, in effect declared the law to be that if the car was overloaded and broke down because overloaded, then respondent was guilty of contributory negligence and could not recover. In short, it was left to the jury by these instructions, to say whether the car broke down from inherent weakness or on account of the overload. Whether the car would have broken down under an ordinary load and whether the accident would have happened, is, perhaps, under the evidence, somewhat problematic. Yet there was evidence tending to show that it was incapable of carrying an ordinary load of steel rails, and we think it was proper to submit the question to the jury. The other instructions given, correctly stated the law of the case fully and fairly for both sides. The refused instructicns asked by appellant are not supported by the evidence and were properly denied.

IV. Appellant contends that the damages are excessive. In support of this contention, our attention is called by its abstract and statement to the fact that on

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the first trial, the verdict recovered by respondent was for nine hundred dollars.

The former trial is not before us for review. The verdict on that trial furnished no precedent for a verdict on the second trial. The evidence of the extent and permanence of the injury may have been much stronger on the last than on the first trial. The time intervening between the two trials, in the course of nature, develop the extent, nature and probable duration of the injury, and furnish the expert witnesses better information and enable them to testify more fully and satisfactorily of the nature, extent and probable duration of the injury.

The trial judge refused to set aside the verdict on account of excessive damages; it therefore had his approval. In such circumstances we are not authorized to interfere unless it is manifest that the jury were actuated by passion or prejudice. The respondent was nineteen years old when injured; he was a laborer, raised on a farm; after the injury he testified that he was unable to plow more than a few hours at a time; he had been lame ever since the injury and was lame at the trial. The injured ankle was enlarged. The expert evidence tended to prove that the sprain was a severe one. One of the physicians stated that there was evidence of injury to the bone. One other said the injury might, and another that he thought it would, be permanent. All agreed that he could not walk in a natural manner, and the evidence was that the ankle joint would for a long time continue weak and easy to be hurt again, and was more liable to disease than a sound ankle. In view of this evidence, we are not prepared to say that the verdict is not the honest expression of the jury of what is a fair and just compensation to respondent for the injury, and affirm the judgment.
Barclay and *Goode, JJ.*, concur.

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MARGARETHA APPEL, Respondent, v. EATON & PRINCE COMPANY et al., Appellants.

St. Louis Court of Appeals, December 23, 1902.

1. **Negligence:** INJURY TO EMPLOYEE: INDEPENDENT CONTRACTOR: LIABILITY OF OWNER OF BUILDING: ACT OF BYSTANDER: TORT: CARE. Plaintiff's husband was killed by being knocked off of a temporary scaffold by a moving elevator in a shaft where he was doing carpenter work upon a building. He was in the employ of an independent contractor, but the agent for the owner of the building, for whose use the work was done, had directed the manner and mode in which the particular work should be performed: *Held*, that the owner of the building (in the circumstances stated in the opinion) was bound to exercise reasonable care to prevent such a movement of the elevator under his control as caused the death of plaintiff's husband.

2. ———: ———: ———: ———: ———. The employee of an independent contractor for the installment of an elevator, in the elevator shaft mentioned in the foregoing headnote, was working at the bottom of the shaft. He requested a bystander to run the elevator out of his way, which he did, stopping the elevator at the third floor above, afterwards the bystander was induced to run the elevator higher, by a stranger who appeared on the third floor. In consequence the elevator ran into a scaffold on which the plaintiff's husband was working: *Held*, that the contractor for the installment of the elevator was not liable for the act of the volunteer bystander in making the last upward movement of the elevator, in the circumstances described in the opinion.

3. ———: ———: ———: ———. Where an employee is present, so as to be able to direct in his work the action of a volunteer assistant, an inference is permissible that the former participates in the work of the assistant in the prosecution of the work in certain circumstances described.

4. ———: ———: ———: MASTER: SERVANT: AGENCY. The liability of an employer for negligence of his servant toward a third person depends on the principles of agency, and does not extend beyond the scope of his employment. It does not exist where the negligence is that of a substitute engaged by a servant without any authority to delegate his master's power in respect of the particular work in charge of the servant.

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5. ——— : ——— : ———. The measure of care required of any person is marked by the circumstances of each case. It is such care as the person should have exercised in the emergency, in the opinion of the final judge of the event; and, if there is room for reasonable difference of opinion, then the criterion is the judgment of a jury determining the case, which the rules of law require of that person.

Appeal from St. Louis City Circuit Court.—*Hon. Jas. E. Withrow,* Judge.

AFFIRMED.

Jno. F. Shepley and *Percy Werner* for appellant Eaton & Prince Company; *Valle Reyburn* for appellant Mississippi Valley Trust Company.

(1) Defendant, the Mississippi Valley Trust Comowed no legal duty to deceased who was the servant of an independent contractor, by violation of which it could be charged with negligence and subsequent liability to plaintiff therefor. Shearman & Redfield, Negligence (5 Ed.), secs. 3, 5 and 25; Herzer v. Mfg. Co., 110 Mo. 605; Gurley v. Railway, 104 Mo. 211; Roddy v. Railway, 104 Mo. 234. (2) Defendant, the Mississippi Valley Trust Company, is not legally responsible for the injury resulting from the action of Loewenstein, towards whom it bore no relation, over whose conduct it had no control, and whose careless conduct it could not reasonably anticipate. McGrell v. Buffalo Office Building Co., 45 Cent. L. J. 133; Ziemann v. Krickhefer, 90 Wis. 497; American Brewing Assn. v. Talbot, 141 Mo. 674; Troth v. Norcross, 111 Mo. 630; Tuteen v. Hurley, 98 Mass. 211.

Daniel Dillon for respondent.

(1) Both defendants were guilty of negligence little less than criminal in failing to exercise care over or to give attention to the west elevator when they knew the perilous position of plaintiff's husband, and

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that the running of that elevator against the scaffold cn which he was working would result almost certainly in his instant death. The term "negligence" is relative, and its application depends on the situation of the parties and the degree of care and vigilance which the circumstances reasonably impose. That degree is not the same in all cases; it may vary according to the danger involved in the want of diligence. Cooley on Torts (2 Ed.), p. 752. (2) "Negligence is no more nor less than this; the failure to preserve, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." Id. Vaughn v. Scade, 30 Mo. 605; Frick v. Railway, 75 Mo. 609; Dowell v. Guthrie, 99 Mo. 663; Hanlon v. Railway, 104 Mo. 390; Quirk v. St. L. U. El. Co., 126 Mo. 279. (3) In order to give a cause of action for negligence it is not necessary that there should have been any contractual relation between defendant and the person injured; nor is it necessary that the relation of master and servant should have existed between them. Morgan v. Cox, 22 Mo. 373; Totten v. Cole, 33 Mo. 138. (4) Even in the case of a trespasser or of one guilty of negligence, when he is seen or known to be in a position of danger, it is negligence not to use care to avoid injuring him. 1 Shearman & Redfield on Negligence (5 Ed.), secs. 99-100; Rinne v. Railway, 100 Mo. 228; Guenther v. Railway, 95 Mo. 286; 108 Mo. 18; Fiedler v. Railway, 107 Mo. 645; Reardon v. Railway, 114 Mo. 384; Hicks v. Railway, 124 Mo. 115; Bunyan v. Railway, 127 Mo. 12. (5) Even if this court should believe that any reversible error was committed in the trial court against one of these defendants and not against the other, this court will not reverse the entire judgment, but would reverse it as to the defendant against whom error had been committed, and affirm it as against the other. Kleiber v. Railroad, 107 Mo. 240; State ex rel. v. Tate, 109 Mo. 269; Neenan v. City of St. Joseph, 126 Mo. 89; Wiggins v. St. Louis, 135 Mo. 558; O'Rourke v. Railroad, 142 Mo. 342.

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BARCLAY, J.—We adopt the greater part of the lucid statement of the facts and of the proceedings in the trial court submitted by the learned counsel for the trust company, one of appellants, making some changes therein to conform to our views upon certain of the controverted points.

This is an action under the statute (R. S. 1899, sec. 2865) brought by plaintiff, the widow of George Appel, against Eaton & Prince Company, and the Mississippi Valley Trust Company.

In November, 1897, defendant, the trust company, was owner of a ten-story office building on Olive street between Eighth and Ninth streets in the city of St. Louis, commonly known as the Burlington Building, which was undergoing a course of general repairing, each department of the work being performed by a contractor. R. P. McClure was the general contractor for a portion of the repairs, including the carpenter work, and the deceased Mr. Appel was a carpenter in his employ.

The co-defendant, Eaton & Prince Company, was the contractor for elevators in the building. The contract for that work, which was put in evidence by one of the defendants, recited that after the day of commencing work on the elevators, the repairing contractor should have the uninterrupted use of the hatchways and of so much of the building as might be necessary to get the machinery and the elevators in position, but he was to keep one elevator in operation for the use of tenants and material.

Other classes of repairs were delegated by other separate contracts to other contractors to the number of twenty-five or more.

A. E. Benoist had charge of the building, representing its owner, the trust company, and he occupied an office therein.

John H. Baird was the general agent in St. Louis of Eaton & Prince Company. Jacob Hirsch was the superintendent of the work being performed by that company. Both Messrs. Baird and Hirsch were at

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the building daily. E. R. Van Sickle was a workman in the employ of the last-named company. He was designated by Mr. Baird as an assistant superintendent. The Eaton & Prince Company had in turn sublet part of the elevator work (including the wiring) to Charles Briner.

November 24, 1897, the work upon the building was approaching completion. The elevators were nearly finished. On that day the east elevator was in operation for the convenience of the tenants of the building, but the west elevator was (and had been for a period of several days) not in common use. It was "dead" as styled by the witnesses. These were hydraulic elevators, that is, they were operated by water pumped to the roof by steam power from an engine in the cellar of the building.

W. A. Savage, an engineer in the employ of the trust company, operated and managed the steam engine and boiler. To stop the elevators it would have been necessary to turn off the steam and water entirely.

On the day mentioned, carpenters (including Appel) in the employ of McClure were engaged in casing the elevator shafts, to perform which work a scaffold was built across the west elevator shaft upon which workman stood as the work advanced from the top floors of the building downward, one shaft at a time. On the day of the accident the workmen were engaged between the seventh and eighth floors on the west elevator shaft. The higher floors had been finished.

During the day some of the carpenters, including deceased as well as the general contractor, McClure, applied to Benoist to have the east elevator cease running for passenger use, so that the work of casing the shaft could be transferred to the east elevator, but Benoist declined, replying that the east elevator was required for the convenience of the tenants of the building. The west, or "dead" elevator, while not in general use for passengers, had, on November 24, been

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operated eight or ten times by workmen employed by Briner, the sub-contractor of Eaton & Prince Company, engaged in wiring the annunciators of the west elevator and standing on the top for that purpose. These men assert that they had been cautioned against running the elevator so high or so far as to strike the scaffold of the carpenters working in this elevator shaft.

About 4 o'clock p. m. the men employed in wiring the west elevator ceased work, lowered the elevator to the basement, and told Savage, the engineer, to turn off the steam, but Van Sickle told Savage that he (Van Sickle) wanted to use this elevator a while and took charge of it to finish the elevator pit as he had been directed to do by both Messrs. Hirsch and Baird. At this time (about half-past four o'clock p. m.) Israel Loewenstein, formerly but not then in the employ of Eaton & Prince Company, entered the building and went to the west elevator where he saw Van Sickle at work putting in a casing of brickwork around the shafting. When he had finished, he asked Lowenstein to take the elevator out of his way, so that he (Van Sickle) could clean out the debris beneath. Loewenstein then ran the elevator to the second floor to find a friend, as he testifies, and then continued to the third floor in the same search; at that floor he stopped the elevator. An outsider then came along, unknown to Loewenstein, and asked the latter to take him upstairs. Loewenstein replied that the elevator was not in use but "dead," and to take the east elevator. The man said he was in a hurry. Loewenstein then took him in the elevator to the seventh floor, where the elevator struck the scaffold on which plaintiff's husband was at work, so injuring him that he died nine days afterwards.

The foregoing is a sufficient outline of the main features of the case. There was testimony tending, at least, to establish the facts recited above. Some further items of proof will be mentioned in the course of the opinion to give a complete view of the vital point of the litigation which is found in the acts of Messrs. Van

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Sickle and Loewenstein and their relation to the Eaton & Prince Company.

The learned trial judge refused an instruction in the nature of a demurrer to the evidence asked by each of defendants. He gave a number of instructions which will be touched upon later.

The jury found for plaintiff against both defendants, and assessed her damages at $3,000. Both defendants moved for a new trial without success. Then they appealed to the Supreme Court after saving exceptions in the usual way. The Supreme Court transferred the cause to this court under the provisions of the law of 1901 increasing the jurisdiction of the Courts of Appeals (Laws 1901, p. 107).

1. Each of the defendants insists that there is no liability on its part. As to the trust company the facts admitted, or shown by its own testimony, make out a perfectly clear case of liability.

The plaintiff's husband was in the employ of McClure, the chief contractor for the work being done upon the building. It is clear, however, that whatever may have been the actual terms of the contract on that point, the trust company was exercising a direct supervision and control over the execution of the very work on which Appel was engaged at the time of his injury. Benoist was entirely frank in his statement of the facts. His interview with the Messrs. McClure and Appel in regard to the placing of the scaffold on which Appel was working when the accident happened was quite sufficient testimony to prove that he was authorized to direct, and did in fact, direct the manner and mode of performing that special work. These facts enlarge the liability of the trust company (in respect of the particular work to which its direction or control was extended) far beyond the limits which would bound it if Appel had been indeed the servant of a truly independent contractor. Burgess v. Gray, 1 M. G. & S. (1 C. B.) 578; Ardesco Oil Co. v. Gilson, 63 Penn. St. 146.

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The trust company having full knowledge of the work at which Appel was engaged was charged with the duty of exercising reasonable care in the circumstances not to permit the west elevator to run into the scaffold on which Appel was working. The engine and power of the trust company were essential to any movement of the elevators. The movements of the west elevator could have been so supervised by reasonable care as to prevent any such catastrophe as occurred. The Eaton & Prince Company had the "uninterrupted use" of the hatchway or elevator shaft, so far as might be necessary to put the machinery and elevators in position; but that company had nearly concluded its part of the improvements. Evidently it did not claim, nor was it allowed, the exclusive use or control of the elevator shaft or well wherein the accident took place.

The measure of reasonable care is to be marked by the circumstances of each particular case. Juridically it is at least such care as the person whose conduct is in question should have exercised in the particular emergency, in the opinion of the final judge or judges of each case. If there is reasonable room for variation of opinion on that subject then the criterion is that measure or degree of care which a jury regards as obligatory upon that person in the circumstances of the case in hand. The care which one owes to another is by no means dependent on a contractual relation between them, although the obligation of care often arises from contract supplementing or enlarging the duty otherwise imposed by law.

The learned trial judge in one of the instructions defined the grounds of liability of the trust company as follows:

"And if the jury further believe from the evidence that defendant, the Mississippi Valley Trust Company, through its agents and servants, had control of said elevator, and before said Appel went to work in said shaft, or while he was working in the same, promised said Appel and his employer, McClure, that

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said elevator should not be run while he was working on said scaffold or platform, and if the jury further believe from the evidence that said Mississippi Valley Trust Company, then and there, through its agents and servants had control of said elevator, and knew that said scaffold had been erected in said shaft, and that a man, or men, were working thereon, and carelessly and negligently allowed and permitted said elevator to be run up in said shaft and strike said scaffold without notifying said Appel in time to enable him to avoid being injured, and that said Appel was injured thereby, and thereafter died from said injuries, then the jury will find in favor of plaintiff against the said Mississippi Valley Trust Company."

There was ample evidence to sustain the theory of the foregoing declaration of law, and by others the more formal facts of plaintiff's relationship to the deceased, the nature of his employment, etc., were submitted for findings.

Having allowed Appel to be set to work in such a place, ordinary care on the part of the manager of the premises required such safeguards as would effectually preclude the accident which befell plaintiff's husband. Hardler v. Buck's Stove Co., 136 Mo. 3.

Ordinary care required that the place where Appel was at work should be maintained in a condition of reasonable safety against such hazards as befell him. He had a right to rely on the assurance involved in his assignment to do the work at which he was engaged when the catastrophe happened. It is part of an employer's duty to use ordinary care to make the place where his employee is at work reasonably safe. In this instance the manager of the building was charged with that duty, in the peculiar circumstances already described. We hold that there was ample evidence to support the verdict for plaintiff as against the trust company, and that there was no error in refusing the peremptory instruction in its favor.

2. There is testimony tending to show that Van Sickle was a workman authorized to represent the

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Eaton & Prince Company in finishing the work remaining to be done by it in the elevator shaft or hatchway. He was empowered to take such necessary steps as appertained to the proper and complete performance of the work which had been assigned to him by Hirsch, the superintendent, whose general authority to act for the Eaton & Prince Company is unquestioned. The work allotted to Van Sickle was to lay some brick at the bottom of the pit in the west shaft, to fill some holes there, to clean out the shaft and to gather up the company's tools. It may be inferred that he had authority to move the elevator, or to cause it to be moved, so far as might be necessary to his work, and that when the entire work was finished he might move the elevator sufficiently to see that it could be operated properly. His employer had guaranteed by its contract of construction that the elevator work should be so finished.

In this situation of affairs Van Sickle requested Loewenstein to run the elevator out of his way. Loewenstein was a former employee of the Eaton & Prince Company, who happened to be there on an errand of his own, as already described. His act in operating the elevator caused the injury as has been already narrated, but not as agent for said company.

The account given by Van Sickle of his order to Loewenstein to run the elevator we shall quote literally:

"Q. What part of the building were you in? A. In the basement.

"Q. What were you doing? A. I was fixing some bricks around the sheaves in the pit, under the bottom of the hatch.

"Q. Which pit, the east or west one? A. The west.

"Q. The east elevator was being used for passengers? A. The east elevator was running for passengers.

"Q. The west elevator was, prior to the injury, not being used? A. It was supposed not to be; I wanted it out of my way; I asked a man to take it out of my way.

"Q. Was it in your way at the time? A. Yes, sir.

"Q. What did you do? A. I told the man to get in and run it up out of the way.

"Q. What was his name? A. Loewenstein.

"Q. What did he do? A. He ran it up out of my way.

"Q. How far did you tell him to run it? A. I don't believe I told him any particular distance.

"Q. He got in and started it up? A. Yes, sir.

"Q. What took place? A. The next thing I knew, there was a crash above and timbers came tumbling down the hatch.

"Q. You found an accident had happened? A. Yes, sir."

The testimony for this defendant tends to show that neither Van Sickle nor Loewenstein knew that Appel was at work in the elevator shaft on the scaffold. Yet the facts in evidence from other sources strongly tend to prove that Van Sickle had such knowledge. He certainly had ample means of knowledge; and it is often a fair and reasonable inference, in cases at law as well as equity, that from facts which point distinctly toward knowledge of another fact such knowledge may be inferred. State ex rel. v. Purcell, 131 Mo. 312; Nat. Bk. of Commerce v. Tobacco Co., 155 Mo. 602.

The circumstances that the party sought to be charged with knowledge denies, it does not conclude the matter. Despite the denial the fact may be found, upon a proper exhibit of testimony which justifies the inference. Here Van Sickle had been engaged for some time at the elevator construction. As a witness he admitted that he thought he had been "through the building up to the top," but he "did not remember being there the day before." On the day before the accident "they had been gathering up things around the building, doing some work on the machines."

His rank in the service of his employer is not very definite. Hirsch, the superintendent, testified that Van Sickle was a "helper" whose duties were "to

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do general work and assist a mechanic," but not to hire or discharge anybody. Baird, a managing officer of the Eaton & Prince Company (who made the contract on its behalf for the entire elevator work), testified that Van Sickle was a workman under the direction of Hirsch. Later, on cross-examination, he admitted that Van Sickle was "not exactly foreman, but took the place of the foreman at that time."

According to everybody's testimony, Van Sickle was in charge of the unfinished work to be done by that company on the day of the accident.

If, as the jury found, Van Sickle was aware of the position of Appel or that workmen were at work upon the scaffold in the upper part of the shaft, that fact was entitled to weight in ascertaining whether he used ordinary care in performing the service for his employer which the jury might reasonably have found to include such movements of the elevator cab itself as might be convenient or necessary to make sure that the general work of the Eaton & Prince Company had been fully performed.

The benefit of every reasonable inference of fact which the evidence will bear must be given to plaintiff in determining the question whether the testimony tends to prove negligence on the part of a defendant. Giving to plaintiff the weight of every inference we can glean from the facts in this record, we must concede that Van Sickle knew of the dangerous position of plaintiff's husband, and that he might be found to have had authority to run the elevator in the shaft as part of the final steps of the work he then had in charge. In this state of the case he put Loewenstein in charge of the elevator with the direction to run it out of his (Van Sickle's) way and gave him no directions to go any particular distance. He did not warn him of the presence of the workmen overhead. He allowed him to take the elevator to get it out of the way, without any directions not to run it to the height where Appel was working. What ensued has been already described. It was originally the impression of the writer that this

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defendant was not liable in the circumstances described. But my learned colleagues are of a different opinion and at length my concurrence is yielded to their view that it was the duty of the Eaton & Prince Company's agent on the ground, to whom the use of the elevator was entrusted (by the contract in evidence) to caution Loewenstein not to run the elevator up the shaft far enough to collide with the workmen there engaged, and that the omission of such precaution was a failure to exercise reasonable care in the circumstances.

The different relationship of service between the man who did the damage with the elevator and Appel precludes the application of the rule of exemption of the master from liability to a servant for injury by his fellow-servant. These men were not fellow-servants within the meaning of that rule. The right to use the elevator shaft which the Eaton & Prince Company undoubtedly had at the time, required it and its employees to use reasonable care not to injure others who might be properly at work in the shaft for other employers.

Without further taking up the various points of exception in detail, we are convinced, after a full rehearing of the appeal, that the cause was properly submitted to the trial court, and that the judgment should be affirmed as to both defendants.

The judgment is affirmed. *Bland, P. J.,* and *Goode, J.,* concur.

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J. E. M. WALKER, Respondent, v. W. L. COOPER, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Contract:** STATUTE OF FRAUDS: PLEADING: PRACTICE, TRIAL. Where a contract within the purview of the statute of frauds is alleged, and is not stated to be oral, the allegation will be taken to mean that the contract was valid in respect of form.

2. ——: ——: ——: ——: GENERAL DENIAL. And a general denial which puts in issue the making of the contract will suffice as a foundation for utilizing the statute of frauds as a defense, but the trial court must be made aware, in some distinct manner, that the party relies on that defense.

3. ——: ——: ——: ——: ——: PRACTICE, APPELLATE. And where the case goes to judgment without an expression of intent to invoke that statute, it can not be availed of upon appeal in the appellate court.

4. **Contract:** TENDER. Where a party absolutely refuses to perform a contract, a tender by the other party is unnecessary.

5. **Evidence:** ERROR. When, in an action for breach of contract of sale of tobacco by sample, the seller refused to perform, and admitted he could not furnish the lot sold, the admission of evidence of a custom in the trade whereby purchasers of tobacco by sample were allowed to inspect the goods before paying for them, if error, was harmless.

6. **Contract, Breach of:** EVIDENCE: HARMLESS ERROR. Where an action for breach of contract of sale was tried by the court, and the court fixed the damages according to the market price of the commodity at the place provided for delivery, the admission of evidence of the market price at the point to which the property was to be shipped was harmless.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer*, Judge.

AFFIRMED.

Stewart, Cunningham & Eliot for appellant.

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(1) The circuit court erred in holding that a contract for the sale of tobacco was made by defendant. Defendant invoked the statute of frauds. R. S. 1899, sec. 3419; Pattison's Missouri Code Pleading, sec. 592; Boyd v. Paul, 125 Mo. 9; Hackett v. Watts, 138 Mo. 502. (2) And the writings put in evidence did not satisfy that statute or show a meeting of minds. Browne on the Statute of Frauds (4 Ed.), secs. 371, 376, 382, 384, 401; Ringer v. Holtzclaw, 112 Mo. 519; Smith v. Shell, 82 Mo. 215. (3) The circuit court erred in admitting evidence of the market value at St. Louis of the tobacco which the contract asserted in plaintiff's petition provided should be delivered at Timmonsville, and in admitting evidence of a resale by plaintiff at St. Louis. Benjamin on Sales (7 Ed.), sec. 882a; Northrup v. Cook, 39 Mo. 208. (4) The circuit court erred in ruling and holding that under the written contract alleged in the plaintiff's petition it was the duty of defendant to ship any of the tobacco in question after the plaintiff had, November 19, 1897, notified defendant that plaintiff would not pay the price upon such shipment being made—nor until after such tobacco should have been conveyed to St. Louis and delivered to and examined by plaintiff. The refusal of defendant's instruction number one was error. McKnight v. Watkins, 6 Mo. App. 118; McManus v. Gregory, 16 Mo. App. 375; Harwood v. Diemer, 41 Mo. App. 48; Diechman v. Diechman, 49 Mo. 107; Westlake v. City of St. Louis, 77 Mo. 47; Girard v. St. L. Car Wheel Co., 123 Mo. 358.

G. B. Webster for respondent; *W. F. McEntire* of counsel.

(1) The statute of frauds is not a question in the case. It was not pleaded nor relied upon below. No instructions were asked upon it, nor was it made a ground for the motion for a new trial or the motion in arrest. "Excepting errors apparent on the face of the record, none will be considered unless assigned in the motion for a new trial." Connelly v. Ass'n, 43

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Mo. App. 283; Haynes v. Trenton, 108 Mo. 123; Hall v. Harris, 145 Mo. 619; Rogers v. Gage, 59 Mo. App. 114; Hanks v. Railroad, 60 Mo. App. 274. (2) "The record proper includes the petition, summons, answer, subsequent pleadings, verdict and judgment." Sickles Sad. Co. v. Bullock, 86 Mo. App. 89. (3) While it is true that the statute of frauds is available as a defense without being pleaded, when the contract is denied, still it must have been relied upon by the defendant in the trial court. Van Idour v. Nelson, 60 Mo. App. 528; Clement v. Gill, 59 Mo. App. 482; Hobart v. Murray, 54 Mo. App. 254. (4) It is not necessary that both parties sign or be bound by the memoranda. Where it is signed by the party sought to be charged the requirement of the statute is met. Ivory v. Murphy, 36 Mo. 534; Cunningham v. Williams, 43 Mo. App. 629; Black v. Crowther, 74 Mo. App. 482. (5) The writing required under the statute is not a contract, but only a note or memoranda of the agreement. It need show no meeting of the minds. A mere offer or proposal in writing is sufficient. Browne, Stat. of Frauds (5 Ed.), sec. 345a; 1 Mechem, Sales, sec. 423. (6) The action of the trial court in admitting evidence of a universal custom of the trade concerning contracts similar to that sued on, was not error. It did not alter the terms of the contract. The custom was a part of the contract itself, and the evidence of it only made clear what the memoranda left unmentioned. Hutton v. Waren, 1 M. & W. 466; Brown v. Byrne, 3 E. & B. 703. (7) A judgment will not be reversed unless it clearly appears that the error complained of is such as would have changed the result, or may have influenced the jury. State ex rel. v. Branch, 151 Mo. 622; Doyle v. Trust Co., 140 Mo. 1; Hall v. Goodnight, 138 Mo. 576; State ex rel. v. Boeppler, 63 Mo. App. 151. (8) There was no error in admitting evidence of the market value of the tobacco at St. Louis. 2 Sedg. Dam. (8 Ed.), sec. 739; Wood's Mayne Dam. (1 Am. Ed.), sec. 22; Startup v. Cartazzi, 2 C. M. and R. 165. (9) There was evidence to support the finding of the trial court that

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the market value of the tobacco at Timmonsville was six and one-half cents, and the finding of the trial court to that effect can not be reviewed. Handlan v. McManus, 100 Mo. 124; Rice v. McClure, 74 Mo. App. 383. (10) The appellant is before this court without any evidence. His bill of exceptions does not contain the depositions he offered at the trial, but merely recites that he offered them and directs that the clerk copy them in. This does not preserve them. Everything not of record proper must be set out in full to be saved, except motions for new trial and in arrest and instructions, and the exception as to these is only by virtue of the statute. R. S. 1899, sec. 866; State v. Griffin, 98 Mo. App. 672.

BARCLAY, J.—Plaintiff brought this action to recover damages for breach of a contract for the sale of tobacco. Both parties are dealers in that commodity.

Plaintiff's case as presented in his petition is that in October, 1897, defendant agreed to sell and deliver to plaintiff 50,000 pounds of "B. Scrap" tobacco, at four cents per pound "free on board," Timmonsville, South Carolina, to be shipped to plaintiff at St. Louis, Missouri, as directed by plaintiff within six weeks from October 14, 1897, "said contract being evidenced by writings signed by the plaintiff and defendant." But defendant afterwards refused to deliver the tobacco in response to plaintiff's demand, within said period, etc.

Defendant denied the charges of the petition, and set up two counterclaims for merchandise sold to plaintiff at later dates than the transaction first mentioned.

The reply of plaintiff admitted the counterclaims.

The cause was tried before Judge Spencer, a jury having been waived.

Defendant was a member of the firm of W. L. Cooper & Co., and we shall refer to him or to his firm indifferently, as there is no point of error assigned which attempts to sever defendant from the liability arising from his membership of the firm.

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Plaintiff's testimony tended to show that in the early part of October, 1897, a broker in St. Louis representing defendant's firm offered for sale by sample to plaintiff 50,000 pounds of "B scrap" tobacco. Plaintiff accepted the offer for shipment as required within six weeks at an agreed price of four cents per pound "f. o. b.," Timmonsville, South Carolina (the chief place of business of defendant). The broker then informed defendant's firm by telegraph of the sale as follows:

"B. S. Sold four cents, ship within six weeks. Answer."

Defendant in like manner replied, October 14, 1897, that he would "ship 50 B. Scp. within six weeks at four f. o. b." and added "Write instructions."

Then followed a series of letters and telegrams, about fifteen in number, between plaintiff, the broker and the firm to which defendant belonged. One of the letters of defendant's firm, dated October 22, 1897, contained this statement: "We will ship the scrap to you as soon as possible, whenever you order us to do so."

The following day defendant's firm informed plaintiff by letter that it would "be impossible to ship the scrap with which we proposed to supply you within ten days" and that defendant, when he wired the acceptance to the broker, had "expected the option of shipping in six weeks."

After that both the defendant's broker and plaintiff protested to defendant by letter against defendant's default, and endeavored to persuade a performance. Then defendant's firm insisted on drawing on plaintiff for proposed shipments in such a way as would require payment before examination or any view of the tobacco by plaintiff. Plaintiff would not consent to that course, and defendant admitted that the lot of tobacco bought by plaintiff had "slipped from our grasp," and proposed to furnish some other stock in its stead. Plaintiff objected. The correspondence

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ceased, and this action followed. While it was in progress, several samples of the tobacco bought were sent by defendant to plaintiff and received by the latter at St. Louis. Other features of the correspondence need not be spread upon the record here. If any further particulars become necessary to elucidate the discussion of the debatable points of this litigation they will be mentioned later. In the course of the trial plaintiff was allowed by the court (over defendant's objection) to introduce testimony by acknowledged experts of a general, uniform custom and usage in the tobacco trade, whereby in a sale by sample the purchaser has the privilege of inspection before acceptance or payment for a shipment of tobacco.

The foregoing is a sufficient general outline of the facts.

The court gave, at the request of defendant, a declaration of law for findings in his favor on the counterclaims and then approved this declaration on the measure of recovery, viz.:

"If under the other instructions given you you find for the plaintiff, you must determine from the evidence and market value or price, free on board cars at Timmonsville, South Carolina, of fifty thousand pounds of B. scrap tobacco at the time when the tobacco in controversy should have been delivered by defendant in compliance with plaintiff's shipping directions. If that market value exceeds two thousand dollars you will deduct $2,000 from it, and the remainder will be the amount of your verdict. If that market value does not exceed $2,000, and if under the other instructions given you you find for the plaintiff, let your verdict be for one dollar."

The learned trial judge found for plaintiff on his cause of action in the sum of $1,250, and, after deducting the admitted counterclaims, gave judgment for plaintiff for the balance, and defendant appealed after the usual steps to that end.

1. Defendant's first assignment of error rests on the contention that there was no valid contract of sale

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for want of sufficient writings. He invokes the statute of frauds here, but he did not invoke it in the trial court so far as this record discloses. Where a contract within the purview of the statute of frauds is alleged, and is not stated to be oral, the allegation will be taken to mean that the contract was valid in respect of form, so that a general denial which puts in issue the making of the contract will suffice as a foundation for utilizing the statute of frauds as a defense. But the trial court must be made aware, in some distinct manner, that the party relies on that defense. Where the case goes on to judgment without an expression of intent to invoke that statute, it can not be availed of upon appeal in a reviewing court. Clement v. Gill, 59 Mo. App. (St. L.) 482.

That proposition is but one application of the useful and just rule of our procedure which forbids any exception to be taken on appeal or writ of error "except such as shall have been expressly decided" by the trial court. R. S. 1899, sec. 864.

As the statute was not indicated in any proper way as a defense in the circuit court, it is unnecessary to weigh the argument of plaintiff claiming that the writings were sufficient to meet the demands of the statute in question.

2. The next claim of error concerns the admission in evidence of a uniform, general and well-known custom in the tobacco trade throughout the country, whereby purchasers of tobacco by sample are allowed to inspect the goods before paying for them.

We shall not find it necessary to investigate the soundness of the ruling admitting the evidence of custom, because, in any aspect of it, the ruling was harmless, or (as the learned judge of the circuit declared) not "vital in this case." The defendant did not pretend to execute this agreement. He refused to perform and admitted that the particular lot of tobacco which he had sold by sample to plaintiff had "slipped from our grasp."

Where one party absolutely refuses to perform a

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contract, a tender by the other party is unnecessary. Westlake v. St. Louis, 77 Mo. 47; Harwood v. Diemer, 41 Mo. App. (St. L.) 48; Enterprise Soap Works v. Sayers, 55 Mo. App. (St. L.) 15. So there was no need for plaintiff to tender the price at Timmonsville, South Carolina, which place the trial court held to be the contract point of delivery by the third instruction given at the instance of defendant. The evidence of custom to support plaintiff's contention for a right to examine the tobacco before payment, could not prejudice any substantial right of the defendant.

3. Like comment may be made on the admission of testimony touching the market price of such tobacco in St. Louis, to which defendant took exception. As the court afterwards, at defendant's request, gave a declaration of law (already quoted) which fixed the market price at Timmonsville, South Carolina, as the standard by which to measure the amount of plaintiff's recovery on his cause of action, the testimony referred to was wholly harmless. The giving of that declaration amounted to a ruling excluding the testimony of the price at St. Louis from consideration in the final result. The cause was tried by the court, and the admission of these items of testimony could not have been harmful to defendant in view of the final rulings of the court.

No error is proper ground for reversing a judgment unless it prejudiced the substantial rights of the adverse party upon the merits of the action. R. S. 1899, secs. 659, 865.

4. Defendant complains of the refusal of a request for a declaration of holding the effect of one of plaintiff's letters to be a refusal to pay cash for the tobacco on its shipment at Timmonsville, etc. We do not consider that the letter had the effect ascribed to it by defendant in the circumstances. The plaintiff evidently did not intend such a meaning; for, in another letter four days later, he reminds defendant that the tobacco which defendant then was proposing to ship was "another lot and not the lot we first bought." Thus indicating plain-

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tiff's view that defendant had refused to perform the contract on his part.

These comments dispose of all of the assignments of error which seem to call for remark. Finding none of them well taken we affirm the judgment. *Bland, P. J.*, and *Goode, J.*, concur.

JOHN W. WILLIAMS, Respondent, v. ST. LOUIS LIFE INSURANCE COMPANY, Appellant.

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h98 1486

St. Louis Court of Appeals, December 23, 1902.

1. **Life Insurance:** ASSESSMENT PLAN: NATURE OF POLICY: STATUTORY CONSTRUCTION. Under the provisions of section 7901, Revised Statutes 1899, every contract of life insurance, whereby the benefit secured is in any manner or degree dependent upon the collection of any assessment upon any person holding similar contracts, is a contract of insurance on the assessment plan.

2. ———: ———: ———: ———. In the case at bar, when the policy of insurance was issued, its payment on the death of the insured did "in some manner or degree" depend upon the collection of an assessment upon the persons holding similar contracts; *held*, that the contract of insurance is on the assessment plan.

3. ———: ———: MISREPRESENTATION: WARRANTY. Any misrepresentation made by the applicant, to procure a policy of insurance on the assessment plan, and which is warranted to be true and enters into the contract of insurance, voids the policy.

4. ———: ———: ———: ———. An insured who signed the application and submitted to the medical examiner, and knew that a policy had been issued, will be conclusively presumed to know, when applying for other insurance, that she had existing insurance.

5. **Insurance Law:** AMENDMENT: STATUTORY CONSTRUCTION. The only amendment effected by the Act of 1897, being now, as amended, section 7910, Revised Statutes 1899, was to incorporate section 7896 (the suicide statute), 7890 (the misrepresentation statute) and 7891 (requiring a deposit of the premiums paid before a defense on the ground of misrepresentation can be made), of the general laws of the State into the section and to apply them to foreign insurance companies. doing business in this State on the assessment plan.

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6. ——: ——: ASSESSMENT PLAN: POLICY OF THE LEGISLATURE. And it was not the purpose of the Legislature to subject domestic companies, doing business on the assessment plan, to other general laws.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

REVERSED AND CERTIFIED TO THE SUPREME COURT.

C. W. Rutledge for appellant.

(1) The policy of insurance is an assessment contract of a domestic company, and the representations were warranted to be true and agreed if false would avoid the contract. (2) The provisions of general insurance laws do not apply to such assessment contracts, and misrepresentations warranted to be true avoid the policy whether fraudulent or not, whether material as a matter of fact or not, or whether of matters actually contributing to the death or not. The "assessment plan" insurance law is a complete and independent insurance law of itself. Aloe v. Life Ins. Co., 164 Mo. 675; Elliott v. Life Ins. Co., 163 Mo. 132; Hanford v. Mut. Ben. Assn., 122 Mo. 50; Aloe v. Life Assn., 147 Mo. 561. (3) Where positive evidence of the misrepresentations is attempted to be disproved by negative evidence only, such as the appearance of the insured to relatives, friends or acquaintances, the appellate court will reverse the judgment without remanding the case for another trial. Aloe v. Life Ass'n, 147 Mo. 561; Sparks v. Knights Templars, 61 Mo. App. 109. (4) Levying an assessment does not create the relation of debtor and creditor between the policy-holder and the company, so that the latter can enforce payment in an action at law. Lehman v. Clark, 174 Ill. 279.

J. H. Trembley for respondent.

(1) The first question involved is not whether the policy in question was issued by an assessment or an old

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line company, but whether the policy as issued is an assessment or old line contract. Logan v. Ins. Co., 146 Mo. 114; Toomey v. Supreme Lodge, 147 Mo. 139. (2) Taking its various provisions into consideration, there can be no question but that it is as held by the trial court, an old line contract, and must be governed by the laws applicable to such policies. R. S. 1899, sec. 7901; Logan v. Ins. Co., supra; Toomey v. Supreme Lodge K. of P., supra; Jacobs v. Life Ass'n, 146 Mo. 523.

BLAND, P. J.—1. The petition is in the ordinary form to recover the sum of $1,000 on a policy of life insurance, dated May 26, 1898, issued by the defendant on the life of Cora Williams, for the benefit of and payable at her death to the plaintiff, who was her husband.

The answer admitted the issuance of the policy, the death of the insured, and that proofs of the loss had been furnished. It then pleaded affirmatively the following special defenses:

"2. That the policy as issued is an assessment contract and not an old line policy, and that there was fraud in the procurement of the policy in the following alleged particulars:

"(a) The assured fraudulently misrepresented in the application for the policy that there was no other insurance on her life, when, as a matter of fact, her life was then insured in the Metropolitan Life Insurance Company.

"(b) Plaintiff, or the assured, substituted some one for medical examination other than the assured.

"(c) In the medical examination part of the application for the policy, different, false and fraudulent statements and representations were made, which voided the policy.

"(d) The policy having become void and the assured having applied for reinstatement, plaintiff, or the assured, substituted some person other than the assured at the medical examination forming the basis of the reinstatement of the policy.

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"(e) In the medical examination part of the policy on which the reinstatement was made, numerous fraudulent misrepresentations were made which voided the policy.

"(f) The policy having again become void, the assured, on April 26, 1899, applied for reinstatement, and in such application made various fraudulent misrepresentations concerning her health, etc., which voided the reinstated policy," and alleged that all of said representations were agreed to be warranties.

The reply was a general denial.

The petition alleged that the defendant is a corporation organized under the laws of this State with authority to issue policies of insurance on the stipulated premium plan.

The answer alleged that the defendant is an assessment company and the certificate of the insurance commissioner, read in evidence, shows that the defendant is authorized to do business as an assessment company and it is conceded by plaintiff that it is an assessment company.

The trial court held that the policy sued on is an old line policy and therefore subject to the general insurance laws of the State.

The policy on its face recites that it was issued "in consideration of the payment in advance of the first annual premium of $18.98 and of the annual payment in advance thereafter of a like amount, to be made on the 26th day of May in every year during the continuance of this policy." The policy, however, contains among others, the following conditions:

"Fourth. The insurance under this policy shall be that of 'non-participating term' during the first two years it shall be in force, and thereafter it shall be a 'whole-life participating' policy. The company agrees to set aside out of each annual premium paid hereon, after the second full policy year, the sum of two dollars and fifteen cents, and to hold the same as a reserve fund for the purpose of maintaining the emergency fund required by the laws of the State of Missouri. Any mor-

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tality in excess of the American table of mortality shall be paid out of the emergency fund, and this policy, if in force, shall be liable for its share of any deficiency caused therein by such payment. Upon the determination by the board of directors of the amount of any such deficiency, it shall be deemed assessed and deferred premiums, and the policy-holder shall pay the same within thirty days after written notice to do so, or the company will accept from the policy-holder a premium note therefor, upon the condition that interest thereon is paid annually, in advance, at the rate of five per cent per annum; the amount of any such note, with accumulated interest, shall be a lien against this policy, and be deducted therefrom in any settlement thereunder; provided, that no deficiency in the emergency fund shall be chargeable to this policy so long as the reserve fund, above provided for is, with its accumulations, sufficient for its maintenance, as required by law.

"Fifth. When the policy has been in continuous force five or more years, and is still in force, the legal holder of this policy may, upon giving thirty days notice to the company of its intention to do so, surrender this policy and receive therefor ninety per cent of its pro rata share of the accumulations in the reserve fund, as determined by the board of directors, in any one of the following modes: In cash, paid up or extended insurance, or the company will loan not to exceed the cash surrender value.

"Sixth. This policy shall be entitled to share in the profits of the company, etc.

"Seventh. Insured may change beneficiary," etc.

Section 7901, Revised Statutes 1899, defines every contract of life insurance whereby the benefit secured is in any manner or degree dependent upon the collection of any assessment upon any person holding similar contracts, to be a contract of insurance on the assessment plan. It would be difficult to employ broader or more comprehensive language than is here employed to define a policy of insurance on the assessment plan and it seems to us that if authority is somewhere given in the

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contract of insurance to the board of directors or other controlling authority, to levy assessments upon all the policy-holders of the company at any time when it may become necessary to pay death losses, or to provide a reserve fund for the purpose of meeting death losses to occur in the future that however infrequent it may be necessary to make such assessments, and although the business methods of the company may have been devised with a view of avoiding as far as practicable the necessity of making such assessments, yet if the power is reserved to make them if the necessity should arise, the policy should be classed as an assessment policy and the payment of a flat premium at stated periods should not take the policy out of the statutory definition of a policy on the assessment plan. Substantially this interpretation of the statute was made in Hanford v. Mass. Ben. Ass'n, 122 Mo. 50, where it was held that a policy which required a payment of a flat premium at stated periods but which also provided for an assessment, when called for by the board of directors, to make up a deficiency in the reserve fund, to be insurance on the assessment plan.

In Jacobs v. Life Association, 146 Mo. 523, the court, speaking of life insurance on the assessment plan, used the following language:

"The primary and controlling principle of the statute is that the benefit is to be paid out of a fund raised by assessment upon other persons holding similar contracts, by which they are made liable for the payment of such assessments. No scheme of life insurance can come within this principle and become insurance upon the assessment plan, unless somewhere along the line of its operations provision is made for such an assessment, and liability for its payment created. The right to have the assessment made must be given to the insured; the duty to make it must be imposed upon the corporation, and liability for its payment upon its members."

The Jacobs case was followed in the cases of Toomey v. Supreme Lodge K. of P., 147 Mo. 129, and McDonald v. Life Ass'n, 154 Mo. 618.

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In the more recent case of Elliott v. Des Moines Life Ins. Co., 163 Mo. 132, a policy that provided for certain fixed premiums to be paid by the insured, but contained a safety clause that should the death rate exceed the rate estimated by the company that, after paying the reserve fund, the company might assess additional pro rata premiums to meet the deficiency, was held to be an assessment policy and the Hanford case was approved and followed, and the Jacobs, Toomey and McDonald cases were construed to apply only to policies where no provisions were made for an assessment and when the insured discharged his full obligation to the company by paying the stipulated premiums as they became due.

In Aloe v. Fidelity Mutual Life Ass'n, 164 Mo. 675, relied on by respondent, the insurance was for a stipulated sum on payment of the stipulated premiums. The eighth and ninth provisions of the charter of the company were as follows.

"MORTALITY FUND.

"Eighth. The amount to be paid by the member into the mortality fund, as specified in the body of this policy, is based on the adjusted mortality experience of life insurance companies for age of entry, and during the first five years from the date hereof, any saving between the mortality assumed and that actually experienced, shall belong to the general fund of the association, and thereafter it shall belong to the member, and shall be paid to him as provided in the body of this policy. Any deficiency in the mortality fund due to the advantage of the member shall be made good out of the equation fund.

"EQUATION FUND.

"Ninth. The member shall pay into the equation fund (which shall be deemed and regarded as a surplus of the association) an amount sufficient to cover his share of the increasing mortality cost due to advancing age, and if the amount specified in the body of this policy for said purpose, based on the tabulated experience of life insurance companies, shall be found by the actuary

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to be insufficient; or, if the mortality among the members of the State in which the insured resides exceed that of the American table of mortality experience, thus causing a deficiency in his contributions to the mortality fund, said members being liable for such excess; or, if the State in which the member resides shall impose any tax or license not contemplated in the construction of the association's rates, then, in either event, the actuary shall determine the amount of deficiency properly chargeable to the member, which amount in either event, the member shall pay to the treasurer of the association within thirty days from the date of notice thereof."

In respect to the policy and these charter provisions the court said, "Translated into plain words, the contract is that the company will pay five thousand dollars to the beneficiary of the insured at his death; provided, every year or every quarter during his life the insured will pay the company a fixed premium; provided, further, that if experience shows that the company has not charged the insured enough premiums it may increase it at any time so as to keep the company solvent. Such a contract lacks the essential elements to bring the defendant company within the meaning of an assessment company under our laws."

The provision of the policy under consideration is that any mortality in excess of the American table of mortality shall be paid out of the emergency fund and this policy, if in force, shall be liable for its pro rata share of any deficiency caused therein by such payment.

The scheme of insurance as shown by the policy is to issue policies for a stipulated sum to become payable on the death of the insured as required by section 7903, Revised Statutes 1899. To provide a mortuary fund to meet death losses a stipulated sum is required to be paid upon each policy at stipulated periods. This sum is based on the American mortality tables.

It is further provided that out of the premium so paid a certain per cent shall be set aside as a reserve fund to meet extraordinary losses by death. To keep this fund up to the required standard it was agreed be-

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tween the policy-holders and the company that the board of directors of the company might make assessments on all the policy-holders and that they (the policy-holders) would pay these assessments in thirty days after receiving written notice. These assessments can be made for no other purpose than to provide a reserve fund for the payment of death losses whenever it shall be necessary to have recourse to that fund for the purpose.

When the policy was issued its payment on the death of the insured did "in some manner or degree" depend upon the collection of an assessment upon the persons holding similar contracts and the case falls clearly within the Hanford case, and the policy is very much like the policy in the case of Haydel v. Mutual Reserve Fund Ass'n, 104 Fed. 718, which was held to be an assessment policy. We conclude that the contract of insurance is on the assessment plan.

2. By the terms of the policy and the application therefor, the warranties and statements made by the insured in her application for insurance and her answers to questions in her medical examination were made a part of the contract of insurance. In her application for insurance Cora Williams was asked the following questions: "What life insurance have you now? Names of companies and amount of insurance?" To which questions she gave the following answer: "None." Whereas in truth and in fact she had on February 5, 1898, made application to the Metropolitan Life Insurance Company for a policy of insurance for $142, payable to her estate, upon which a policy for the amount applied for had been issued to her and was in full force when she made her application to the defendant company for insurance, and continued in force until her death, and was after her death paid to her mother. Any misrepresentation made by the applicant, to procure a policy of insurance on the assessment plan, and which is warranted to be true and enters into the contract of insurance voids the policy. Aloe v. Mutual Reserve Life Ass'n, 147 Mo. 561; Aloe v. Fidelity Mu-

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tual Life Ass'n; Elliott v. Des Moines Life Ins. Co.; Hanford v. Mass. Ben. Ass'n, supra.

These decisions were rendered on the statute (sec. 5869, R. S. 1889) prior to its amendment in 1897, being now as amended section 7910, Revised Statutes 1899. As amended this section reads as follows:

"Every corporation doing business under this article, shall annually, on or before the first day of February, return to the superintendent of the insurance department, in such manner and form as he shall prescribe, a statement of its affairs for the year ending on the preceding 31st day of December, and the said superintendent, in person or by deputy, shall have the power of visitation of and examination into the affairs of any such corporation, which are conferred upon him in the case of life insurance companies by the laws of this State; and all such foreign companies are hereby declared to be subject to, and required to conform to the provisions of sections 7896, 7991, 7890 and 7891 of the Revised Statutes of Missouri of 1899, and governed and controlled by all the provisions in said sections contained: *Provided always,* that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth and provided."

It is contended by respondent that all assessment companies, domestic as well as foreign, are brought under the general insurance laws by the amendment. The only amendment effected by the Act of 1897 was to incorporate sections 7896 (the suicide statute), 7890 (the misrepresentation statute) and 7891 (requiring a deposit of the premiums paid before a defense on the ground of misrepresentation can be made) of the general laws of the State into the section and to apply them to foreign insurance companies doing business in this State on the assessment plan.

We think it is obvious that it was not the purpose of the Legislature to subject domestic companies doing business on the assessment plan to these general laws.

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To so construe the statute would bring domestic companies under the provisions of section 7991, Revised Statutes 1899, in respect to service of legal process upon them and require them to keep a designated agent in the State upon whom such process might be served and make of them an exception, in this respect, to all other domestic corporations. The clause which brings these amendments into the statute declares that they shall apply to foreign corporations. In respect to domestic corporations, the statute is word for word as it read before the amendment.

An effort was made by the respondent to show that Cora Williams did not know, or might not have known, that the Metropolitan Life Insurance Company had issued a policy on her life. Her mother testified that she had had possession of the policy and paid all the premiums. Cora signed the application and submitted to the medical examination in order to procure the insurance and knew that the policy had been issued, and it must be conclusively presumed that she knew, when she made answer to the questions directed to her for the purpose of eliciting the truth as to whether or not she had any other insurance, that her answer was untrue. The character of the evidence offered for the purpose of showing that she perhaps did not know of the policy in the Metropolitan Life Insurance Company, is not worthy of a moment's consideration.

This view of the case makes it unnecessary to consider any of the other errors assigned by the appellant. Our conclusion is that by reason of the false representation and warranty made by the insured in respect to other insurance on her life renders the policy sued on void.

The judgment is reversed. *Barclay, J.,* concurs; *Goode, J.,* dissents from the absolute reversal of the judgment on the ground that he deems the decision contrary to the decision of the Supreme Court in the cases of Jacobs v. Omaha Ins. Ass'n, 146 Mo. 523, and Aloe v. Life Association, 164 Mo. 675. This case is therefore certified to the Supreme Court for final determination.

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JOHN F. BENSON, Respondent, v. ANNIE BENSON, Admx., etc., Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Administratrix: PURCHASE OF ASSETS OF ESTATE BY ADMINISTRATRIX: SETTING ASIDE SALE: PARTIES. Courts will not set aside purchases of trust property by a trustee at his own instance as a matter of course, the rule against such dealings being intended for the protection of the beneficiaries.**

2. **———: ———: ———: ———. A purchase of property of an estate by the administratrix at its appraised value can not be set aside at her own instance, though she had been imposed on and had bought at an excessive price, where she had retained the property for more than a year, and made payments on it, and only one creditor was represented, in the proceedings to set it aside, and none of the heirs.**

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

AFFIRMED.

John M. Wood for appellant.

(1) As appears from the record, the gist of the contention herein is, the sale in question being void, is appellant under the evidence estopped from pleading this fact as a defense? As appears from the record, defendant contends that the sale in question is void, and respondent, in effect, admits this contention, but claims that under the evidence appellant is estopped from attacking the validity of said sale. It is true respondent contends that under section 227, Revised Statutes 1899, the prayer of his petition should be granted. But if it be conceded that the sale was void then, as appears from the record, there is no money in the hands of the appellant out of which to make payments on any of the demands allowed against the estate, and the order on the

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appellant to make payments on the demands was without authority of law. Clark v. Sinks, 144 Mo. 448. (2) The only question for the court to determine, therefore, is, as to whether under the evidence appellant is estopped from pleading as a defense that said sale was void. There is no evidence of fraud or misconduct on the part of defendant. To require appellant to make a gift of $900 to this estate would be unconscionable. "Where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, equity will interfere in its discretion, in order to prevent intolerable injustice." Blair v. Railway, 89 Mo. 392.

Bertrand F. Fenn for respondent.

(1) It is an ancient and very familiar doctrine that the sale by an executor, or administrator, of property, of the estate to himself, either directly or indirectly, whether at private sale or a public one, no matter how honest, open and fair, may be avoided at option of the beneficial owner, or *cestui que trust.* 2 Werner's American Law of Administration, section 334, page 700. But generally such sales are not void, but voidable. Ib. Though such sale is void as against the *cestui que trust,* distributee and creditors, the administrator who makes it can not take advantage of his own wrongful act to set it aside, but creates by such sale an estoppel personal to himself. Hopper v. Steel, 18 Ala. 831, and cases cited. The judgment is final until properly vacated by the probate court. Bland v. Muncaster, 24 Miss. 62. In the case at bar, the probate court heard all the evidence and approved of the sale. The appellant in the sale of the property to herself was acting within the rights given her by section 117, Revised Statutes 1899. The action of the lower courts was proper. Sec. 227, R. S. 1899.

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GOODE, J.—The case originated in the probate court of the city of St. Louis where plaintiff filed his petition for an order on the defendant to pay in full, or pro rata his fifth-class claim of $122.85, which had been duly probated against the estate of appellant's intestate and placed in the fifth class of demands. On a hearing in the probate court, that court made an order directing appellant to pay all demands of the first, second, third and fourth classes allowed against the estate, and fifty per cent of all the demands of the fifth class. The case was appealed to the circuit court by the administratrix where the cause was submitted to that court on the following agreed statement of facts and contentions of the parties:

"In order to obtain a speedy trial of this cause, and to minimize the expense thereof, it is hereby stipulated and agreed by and between the parties in this cause that the same be submitted to the court without a jury and without argument, and upon the following agreed statement of facts and contentions of the respective parties based thereon, to-wit:

"STATEMENT OF FACTS.

"On or about the —— day of June, 1898, defendant Annie E. Benson was, by the probate court of the city of St. Louis, appointed administratrix of the estate of said Henry C. Benson, qualified as required by law, and on the —— days of June and July following, published notice of her appointment. On the —— day of June, following her appointment, the administratrix filed an inventory and appraisement of the property of the estate as the law directs. At the time of his death said Henry C. Benson was the owner of and engaged in operating a soda water factory in the city of St. Louis.

"The appraisers appointed by the probate court appraised the machinery, stock on hand, and equipment of this factory at $1,829.88, when in fact its market value at the time did not exceed six or seven hundred dollars. From the property last described there was

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set off to the widow, said Annie E. Benson, as her absolute property, pieces of machinery and parts of the equipment of the value of $400, according to said appraisement, leaving the remainder of said plant and equipment of the appraised value of $1,429.88.

"This residue consisted largely of bottles, boxes, corks, etc., used in the business. Annie E. Benson is an uneducated and very ignorant woman. Her ability to write and read writing is limited to her own name, and her ability to read print is limited to the simplest words. While plaintiff was present and assisted the appraisers in appraising said property, defendant was not present, was not consulted, and made no suggestions regarding said appraisement, and at no time knew the market value of said property. On June 28, 1898, the probate court directed said administratrix to sell said residue of the equipment of said factory, which was appraised as aforesaid at $1,429.88 for cash, at not less than the appraised value. Pursuant to this order the administratrix made an effort to sell said property, but failed to find a purchaser.

"Having reported this fact to the court, the court afterwards, on October 24, 1898, made a second order directing her to sell said property for cash, at not less than its appraised value, and further directing her to retain said property at its appraised value, in case she could find no other bidders at that price. Afterwards, on April 29, 1899, she reported to the court that she had made diligent effort to sell said property on the terms named in said order, and to that end had offered the property to the heirs and creditors of the estate, and having received no bids for the same, had retained the property herself at its appraised value, $1,429.88, as directed by the court. This report was approved by the court, and defendant charged with said amount. The defendant has not disposed of this property, but substantially all of it is now in her possession, and is now worth substantially as much as at the date that she purchased it. By charging herself with the appraised value of said property, $1,429.88, defendant's last an-

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nual settlement, made prior to the filing of the petition herein, shows a balance in her hands of $1,023.29. At the date that plaintiff filed his petition herein, only a part of the expense of the administration of said estate had been paid. Since this cause was appealed from the probate court, defendant has paid the clerk of said court, on account of fees, taxed in the administration of said estate, the sum of $46.55, for which defendant has not received credit, and the sum of $—— is still due on that account, and for which defendant is liable.

"Defendant is insolvent, and any amount adjudged to be paid by her must be paid by the surety on her bond. Only $270.98 in cash was received by the administratrix from the estate, and this was disbursed before this proceeding was begun. The only assets in her hands now, and at the date of the institution of this proceeding were and are the goods and chattels aforesaid appraised as aforesaid at $1,429.88, against which she had made advancements up to the date of the institution of this proceeding sufficient to reduce the balance charged against her to $1,023.29, and has since advanced $46.55, as aforesaid."

"CONTENTIONS OF PLAINTIFF.

"1. That under the provisions of section 227 of the Revised Statutes of 1899, the prayer of the plaintiff should be granted.

"2. That by reason of her delay, defendant is now estopped from claiming that the sale of said property to her was void.

"3. As the purchase by defendant was voluntary, the fact that she paid more for the property than it was worth constitutes no defense to this action."

"DEFENDANT'S CONTENTIONS.

"1. That the sale of the property by the administratrix to herself was void, notwithstanding its approval by the probate court.

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"2. As the evidence shows that defendant has not disposed of the property, and that it is worth substantially as much now as at the time she bought it, there can be no estoppel in the case, and for the court to hold the sale void would be but just to her surety, and give the creditors all they are entitled to—the market value of the property at the time she bought it.

"3. The administratrix not having disposed of the assets in question, the application for distribution must, under the law, be denied. (Clarke v. Sinks, 144 Mo. 448.)"

The circuit court made a similar order to that made by the probate court, from which, after an unsuccessful motion for new trial, the administratrix appealed to this court.

The cause was tried in the circuit court on the theory that the so-called sale of the property to the appellant, as administratrix, was an invalid sale but that by reason of her retention of the property she was estopped to deny the sale.

The agreed facts show the appellant retained what of the personal property of her deceased husband's estate was left after deducting her widow's allowance, the property being taken by her at its appraised value with the approval of the probate court, which authorized this course in advance and approved of it afterwards. Appellant was charged with the value of the property retained by her, to-wit: fourteen hundred and twenty-nine dollars and twenty-eight cents, on which sum she subsequently paid enough to reduce the balance charged against her, at the institution of this proceeding, to ten hundred and twenty-three dollars and twenty-nine cents and has paid forty-six dollars and fifty-five cents more since the proceeding was instituted. She reported the retention of the property and her report was approved in April, 1899, a year and one-half before respondent's motion for distribution was made.

The transaction in regard to the property amounted to a purchase of it by the appellant, which, as she was

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acting as trustee of the property, was illegal and voidable at the instance of any *cestui que trust*. A few decisions have held such purchases by executors and administrators to be utterly void both at law and in equity; but the weight of opinion is that they are only voidable and suffice to pass the legal title to property; though probably any court would set one aside at the complaint of a creditor of the estate or a legatee without proof of actual prejudice to the interest of the estate since the law prohibits a trustee from buying at his own sale. 2 Woerner's Admin. Law (2 Ed.), sec. 487; Melons v. Pabst Co., 93 Wis. 153; White v. Iselin, 26 Minn. 487; Otis v. Kennedy, 107 Mich. 312; Murphy v. Teter, 56 Ind. 545; Anderson v. Green, 46 Ga. 351; Borders v. Murphy, 125 Ill. 577; Fox v. Macbeth, 1 W. & T. Lead. Cas. In Eq. (part 1) note on p. 256; Wilson v. Proup, 2 Cow. 238; Ives v. Ashley, 97 Mass. 198; Baines v. McGee, 1 S. & M. 218; Den v. McKnight, 6 Halstd. 385; Litchfield v. Cudworth, 15 Pick. 31.

Whatever their holdings on the subject are, courts do not set aside purchases of trust property by trustees at their instance as a matter of course; because the rule against such dealings is intended for the protection of beneficiaries and was adopted to prevent them from being defrauded by self-serving trustees. Fox v. Macbeth, 1 W. & T. Lead. Cas. 257; Richardson v. Jones, 3 Gill & Johnson, 163.

Facts are mentioned in the agreed statement which might commend the appellant to a court of equity for relief as one who has been imposed on; but the purchase by her can not be treated as a nullity in this decision after she has retained the property for more than a year and made payments on the price of it. The necessary parties are not before the court to enable us to go into the whole matter and set aside the sale as having been induced by mistake or imposition or hold the appellant for the actual value of the goods on the theory of a conversion by her. Only one creditor is represented and none of the heirs, if there are any. Yet all creditors and heirs are interested in the matter, and for aught

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that appears there may be other parties to be affected by any radical judgment that might be entered. This shows the need of resorting to equity or at least to some step or proceeding by which every one concerned is brought before the court. Thorp v. McCullum, 6 Ill. 614; Mock v. Pleasant, 34 Ark. 63; Bland v. Muncaster, 24 Miss. 62. The relief prayed was rightly granted under sections 227 et seq., Revised Statutes 1899.

The judgment is affirmed. *Bland, P. J.*, and *Barclay, J.*, concur.

BENJAMIN CUNLIFF, Respondent, v. ALBERT C. HAUSMAN, Appellant.

St. Louis Court of Appeals, December 23, 1902.

1. **Practice, Trial:** PRACTICE, APPELLATE: VERDICT: APPELLATE COURT. Where the verdict is for the plaintiff the evidence should be viewed by the appellate court in its most favorable aspect in support of the verdict.

2. **Commissions of Real Estate Agent:** EVIDENCE. Where the evidence tends to prove that plaintiff, in an action for commissions for the sale of real estate, set on foot inquiries and negotiations that finally culminated in the sale of the real estate; that the plaintiff brought the buyer and seller together, he is entitled to his commissions.

Appeal from St. Louis City Circuit Court.—*Hon. William Zachritz,* Judge.

AFFIRMED.

STATEMENT.

The cause was first tried in the justice's court, where it originated, on the following statement:

"St. Louis, Mo., May 24, 1901.

"Albert C. Hausman,

"To Benjamin Cunliff, Dr.:

"To services rendered as real estate agent, procuring purchaser for sale of lots seven and eight, of city block 3861, 100 feet on south side of Cabanne avenue; commission two and one-half per cent on selling price, $9,000 .... $225.00

"Received payment."

On a new trial in the circuit court (where the cause was taken by appeal) to the court sitting as a jury, plaintiff recovered judgment from which defendant appealed.

Briefly stated, the facts are, that defendant owned a vacant lot on Cabanne avenue, in the city of St. Louis, which was for sale and was in the hands of J. I. Epstein, a real estate broker, and on which, for over two years, he had posted a sign "For Sale;" that W. F. Little had seen the lot with the sign "For Sale" posted on it and was desirous of buying it but did not know to whom it belonged or the price of it. D. W. Hewitt, a real estate broker, was in the office of Little in February, 1900, when Little asked him to find out who owned the lot and the price of it. Hewitt agreed to do this and went to plaintiff, also a real estate broker, for information on account of his superior knowledge in respect to property in that part of the city. Plaintiff showed Hewitt a plat of the lot, told him that defendant owned it and called up defendant by telephone and asked him the price of the lot and said to him that he had a prospective purchaser in the person of Little. Defendant told plaintiff that the price was $90 per foot and to go ahead and sell it. Hewitt was present during this telephonic conversation and went back to Little's office and told him that defendant owned the lot and the price.

Thus far Hewitt and Little agree in their testimony but give different account of what took place afterwards.

Hewitt testified that when he reported the price that Little said it was cheap enough and asked if he could trade in a lot that he owned on Von Versen

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avenue; that he (Hewitt) told Little it was not a trading proposition and Little replied, "We will take the matter up later on; I am busy now with some other matters."

Hewitt further testified that he went back to Little's office two or three times after this on other business and mentioned the Cabanne lot to him, and Little said, "Let it drop now, we will take it up later."

Little testified that Hewitt knew he was in the market for a lot and mentioned several other lots to him when he (Little) suggested this lot, and that when he reported the price of the lot to him he told him he would not pay that price for it and considered the matter ended at that time and had nothing more to do with Hewitt about the lot; that about May 10, 1900, Little went into Epstein's office and bargained for the lot for about $88.50 per front foot, and a few days afterwards the deal was closed by defendant conveying the lot to Little.

At the time the contract of sale was made defendant did not know the name of the purchaser nor did he learn it until he came to Epstein's office to sign the deed and he testified that at that time it did not occur to him that Little was the name communicated to him by plaintiff as a prospective purchaser; that if it had occurred to him he would not have made the deed because, to use his own language, "I would not go to work and sell my lot through another real estate agent when I thought another one had a possible claim on the sale."

At the instance of plaintiff the court declared the law as follows:

"1. The court, sitting as a jury, declares the law to be that if it finds from the evidence that the plaintiff's agency was the procuring cause of the negotiations between defendant and Little, which resulted in a sale of the defendant's property, the plaintiff is entitled to recover, even though it may further find that the negotiations were made with the defendant, and without his knowledge that plaintiff's agency was the procuring cause of such negotiations.

"2. The court, sitting as a jury, declares the law

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to be that if it finds from the evidence that Little was brought to a negotiation with the defendant which resulted in the sale of the defendant's property, from information given him by Hewitt, and derived by Hewitt from the plaintiff while plaintiff was acting as the agent of the defendant in relation to said property, then the plaintiff is entitled to recover.

"3. The court, sitting as a jury, declares that if it finds from the evidence that the plaintiff's agency was the procuring cause of the negotiations between the defendant and Little, which resulted in an exchange of the defendant's property, the plaintiff is entitled to recover, even though it further finds that the negotiation was concluded through Epstein.

"4. The court, sitting as a jury, declares the law to be that if it finds from the evidence that the customary commission on selling property in the city of St. Louis is two and one-half per cent upon the selling price thereof, then if the plaintiff was entitled to recover under the other declarations of law herein, he should have judgment for the sum of $225, together with interest from the date of filing until June 18, 1901, at six per cent."

Defendant moved the court to declare the law as follows:

"1. The court instructs that under the law and the evidence adduced by the plaintiff in this case the plaintiff can not recover.

"2. The court declares that under the law and all the evidence in the case the plaintiff is not entitled to recover and the finding must be for the defendant.

"3. The court declares that unless the plaintiff actually sold the defendant's lot or produced to the defendant a buyer for it, ready, willing and able to purchase on the terms authorized by defendant, or unless the court finds from the evidence that the plaintiff before May 22, 1901, informed the defendant that he had such a purchaser and disclosed his identity, and that the defendant then went to such purchaser and sold the lot without the intervention or assistance of plaintiff, the judgment must be for the defendant.

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"4. The court declares that if the evidence shows that when the witness Hewitt approached the purchaser Little for the purpose of selling him the defendant's lot, no definite agreement was made by said Little to purchase said lot and that said Little then abandoned the purchase, then plaintiff can not recover unless after that time he procured a valid and binding agreement from a solvent purchaser to buy the lot upon the terms authorized by defendant or produce to him a purchaser, ready, willing and able to buy said lot," which the court refused.

Chas. W. Holtcamp and *G. B. Webster* for appellant.

(1) Plaintiff did not make out a case in assumpsit. It was an essential element of his case that defendant knew at or before the sale that the purchaser was the same person to whom Cunliff had previously tried to sell the property, and there was no proof of that. The law does not raise an implied promise to pay where there is no knowledge of an existing right to receive payment. Pool v. Adkisson, 1 Dana 117; Glenn v. Savage, 14 Ore. 577; Boston Ice Co. v. Potter, 123 Mass. 28. (2) Plaintiff was not the procuring cause of the sale. Ramsey v. West, 31 Mo. App. 689; Crowley v. Somerville, 70 Mo. App. 376; Baumgarti v. Hayne, 54 Ill. App. 501; Earps v. Cummins, 54 Pa. St. 394; Donovan v. Ives, 73 Ga. 301; Platt v. Johr, 9 Ind. App. 58; Wooley v. Buhler, 73 Hun 158; Sibbad v. Iron Co., 83 N. Y. 378; Hay v. Platt, 66 Hun 488. (3) The services rendered by the broker must be the procuring cause of the sale; in other words, the *causa causans*. Ramsey v. West, 31 Mo. App. 689. (4) Plaintiff's first and second declarations should not have been given because they permitted a recovery regardless of whether or not he was the procuring cause of the sale and authorized a verdict if he was only a remote cause in the chain of events which led up to the sale. The peremptory declarations offered by the defendant should

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have been given. He was not entitled to recover under his own theory, upon the foregoing authorities. (5) It was prejudicial error to admit over the objection of the defendant the testimony of plaintiff and of the witness Hewitt as to the conversations between themselves out of the presence of the defendant. That testimony was wholly incompetent by all the rules of evidence. 1 Greenleaf, Ev. (15 Ed.), sec. 99; 1 Phillips, Ev., 143; Wilson v. Hempstead, 72 Mo. App. 656; Young v. Gobe, 15 Wall. 562; Mulford v. Caesar, 53 Mo. App. 263.

Jones, Jones & Hocker for respondent.

The plaintiff was the procuring cause of the negotiations which consummated the sale of the defendant's property and therefore, under the authorities, is entitled to his commission. Tyler v. Parr, 52 Mo. 250; Timbermann v. Craddock, 70 Mo. 638; Gellatt v. Ridge, 117 Mo. 553; Grether v. McCormick, 79 Mo. App. 325.

BLAND, P. J.—The contention of the defendant is, that plaintiff was not the procuring cause of the sale.

The verdict being for plaintiff the evidence should be viewed in its most favorable aspect in support of the verdict. Hewitt, for the purpose of finding out the owner and the price of the lot, represented Little; what he did, in this respect, Little did. Little, through Hewitt, went to plaintiff and through plaintiff was put in communication with the owner and learned the price of the lot and the fact that plaintiff was authorized by the owner to sell the lot at $90 per front foot. Little, for the reason that he had other matters on hand requiring his immediate attention, postponed the proposition to sell the lot at $90 per foot until he got ready to take up the matter. When he was ready to take the matter up he went to Epstein, another real estate agent of defendant who was known to Little to have authority to sell the lot, and made the purchase from him without notice to plaintiff or Hewitt, and defendant approved the sale at a price less than he had given plaintiff. The trans-

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action was not different than it would have been had Little gone to defendant and negotiated the sale with him in person, instead of going to his agent and making the purchase.

The evidence, therefore, tends to prove that plaintiff set on foot inquiries and negotiations that finally culminated in the sale; in other words, that he brought the buyer and seller together, if so he is entitled to his commission. Veatch v. Norman, 95 Mo. App. 500, 69 S. W. 472.

The judgment is affirmed. *Barclay* and *Goode, JJ.*, concur.

JOHN FRANKLIN, Respondent, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Master and Servant**: SAFE APPLIANCE: NEGLIGENCE: EVIDENCE. In an action for negligence, evidence of other independent and disconnected acts of negligence is not admissible, nor of a negligent act which could not contribute to the injury complained of.

2. ———: ———: ———: ———: NOTICE. Though a negligent act is in a sense collateral to the act complained of, yet if an inference may be drawn bearing upon the alleged negligence, evidence thereof is admissible; and so where the master furnished a lot of mauls from which the servant selected one, by reason of a defect in which he was hurt, he may in an action to recover damages for his injury show that the whole lot were "chipped, nicked, slivered and scaled," as from such fact the inference is deducible that the maul in question was defective and that the defendant had notice thereof.

3. ———: ———: ———: INSURER. The master must use reasonable and ordinary care in procuring appliances and in keeping them in repair. He is not required to furnish absolutely safe tools; and reasonable and ordinary care depends upon the nature of the appliance and the dangers to be encountered.

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4. ——: ——: ——: PRESUMPTION: LATENT DEFECTS. The servant may presume that the appliances are reasonably safe and he does not have to search for latent defects, but uses tools with known defects at his own risk; he, however, is required to exercise care incident to the situation in which he is placed; and whether he does so is a question for the jury.

5. ——: ——: ——: ——. It is presumed that the appliance furnished is safe, and if injury results it is presumed the master had no notice of the defect and was not negligent; but in this case the defect in the mauls was known to the master and they were furnished to the servants with such knowledge.

6. ——: ——: ——: ——. Though the servant know of the defect in the maul he may recover for the injury resulting from the defect if he reasonably supposed he could use it with safety, and the fact that two kinds of mauls were furnished for the same work, one chipped and the other not, affords a basis for the inference that the chipped lot were defective.

7. ——: ——: ——: EVIDENCE: JURY QUESTION. A verdict founded upon inferences having no just basis in the facts, should not be permitted to stand, but on the evidence in this record the case was properly sent to the jury.

8. ——: ——: ——: ORDER OF MASTER. Where the master instructs the servant to use his maul in a certain way, the servant had a right to rely on his master's knowledge and judgment as to the strength of the maul and its adaptability to the use he was directed to put it, and the servant can not be said, as a matter of law, to be guilty of contributory negligence in so using it.

9. ——: ——: ——: PROXIMATE CAUSE: JURY QUESTION. The question whether plaintiff's injuries were occasioned by striking a spike with his maul or by striking it against another maul being a controverted issue of fact, was for the jury.

10. ——: ——: INSTRUCTION: WIDENING ISSUES. An instruction set out in the opinion, which after being modified was given by the court, is held not to have widened issues tendered by the pleadings, but if so it was properly given since no objection was made to the admission of the evidence on which it was based.

Appeal from Cole Circuit Court.—*Hon. James E. Hazell,* Judge.

AFFIRMED.

Geo. P. B. Jackson for appellant.

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(1) The evidence did not establish negligence on the part of defendant. The fact that plaintiff was injured is not enough to raise a presumption of negligence. Blanton v. Dold, 109 Mo. 74; Bohn v. Railroad, 106 Mo. 429; Carvin v. St. Louis, 151 Mo. 334; Railroad v. Nelms, 9 S. E. (Ga.) 1049. (2) The defendant was not required to furnish absolutely safe tools to the plaintiff. Its duty was to use such care as a person of common prudence would use in selecting tools reasonably safe for the purpose for which they were intended. The employer is not an insurer of the safety of the tools furnished by him. Blanton v. Dold, 109 Mo. 74; Bohn v. Railroad, 106 Mo. 429; Friel v. Railroad, 115 Mo. 503; Gutridge v. Railroad, 105 Mo. 520; Tabler v. Railroad, 93 Mo. 79; Bowen v. Railroad, 95 Mo. 268; Higgins v. Railroad, 43 Mo. App. 547; Marshall v. Hay Press Co., 69 Mo. App. 256; Krampe v. Brewing Co., 59 Mo. App. 277; Berning v. Medart, 56 Mo. App. 443; Muirhead v. Railroad, 19 Mo. App. 634; Conway v. Railroad, 24 Mo. App. 235. (3) Proof of the existence of a defect (if one actually existed) would not, of itself, establish a right of recovery. It must appear, not as mere conjecture, but as a legitimate inference that the defect was the proximate cause of the injury, and that the defendant was chargeable with knowledge of it. There was no such evidence in this case from which any such inference could be drawn. Breen v. Cooperage Co., 50 Mo. App. 202; Brown v. Lumber Co., 65 Mo. App. 162; Covy v. Railroad, 86 Mo. 635; Current v. Railroad, 86 Mo. 62; Railroad v. Nelms, 9 S. E. (Ga.) 1049. (4) The undisputed evidence clearly established that defendant had used all usual and reasonable care in procuring the mauls which it furnished to the gang of which plaintiff was a member, and that they were practically new at the time plaintiff was hurt. There was no evidence tending to show anything to the contrary, or that defendant had any reason to suspect any defect. Bohn v. Railroad, 106 Mo. 429, and other cases cited above. (5) For the foregoing reasons the court erred in re-

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fusing to sustain the demurrer to the evidence. (6) Moreover, plaintiff was guilty of negligence on his part, when he recklessly struck his maul against another one (the evidence leaves no room to doubt that that act was the cause of the injury) and that it was a thing that no prudent person would do. (7) The court erred in overruling the defendant's objection to evidence concerning the condition of any maul other than the one which caused the injury. Railroad v. Nelms, 9 S. E. (Ga.) 1049. (8) The court erred in amending defendant's seventh instruction, thereby enlarging the right of recovery beyond anything alleged in the petition. Brown v. Lumber Co., 65 Mo. App. 169; Covy v. Railroad, 86 Mo. 635. Nor was there any evidence to justify this amendment, even if it had been warranted by the petition.

Silver & Brown for respondent.

(1) The evidence in this case clearly made it one for the jury. Booth v. Railroad, 76 Mo. App. 516; Duerst v. Stamping Co., 163 Mo. 607. (2) The fact that an appliance breaks in using it as intended constitutes evidence that it was defective and unsafe, and the further fact that the defendant was then using it in its business is some evidence of its negligence. Moyniham v. Hills Co., 146 Mass. 591. (3) Plaintiff was justified in using the maul, although he saw it was defective, provided its condition was such that he might reasonably suppose he could, with care, use it safely. Booth v. Railroad, 76 Mo. App. 516, supra; O'Mellia v. Railroad, 115 Mo. 205. (4) That the defective character of the maul was known to defendant or could have been so known by the exercise of reasonable care on its part, were questions for the jury. Siela v. Railroad, 82 Mo. 430; Braun v. Railroad, 53 Iowa 595. (5) Possession of means of knowledge of a particular fact justifies the finding of the actual knowledge thereof. Kingel v. Knuckles, 69 S. W. 595. (6) Whether or not the plaintiff was hurt in striking the spike, as testified to by

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him, or by improperly striking another maul with the maul he was using, was, under the evidence, a controverted question of fact for the jury. Duerst v. Stamping Co., 163 Mo. 607; Duncan v. Matney, 29 Mo. 369. (7) The court did not err in admitting the evidence as to the defective condition of the other jug mauls used by plaintiff and his co-workmen at the time of plaintiff's injury. Rose v. St. Louis, 152 Mo. 602; Savannah v. Railroad, 85 Ga. 579; Luetgert v. Volker, 153 Ill. 385; Baxter v. Doe, 142 Mass. 358; Railroad v. Hill, 93 Ala. 514; Salem Co. v. Griffin, 139 Ind. 141; Pacheco v. Manufacturing Co., 113 Cal. 541. (8) The court did not err in its modification of defendant's instruction 7. There was evidence tending to show that defendant's foreman, Johnson, authorized the use of the maul here complained of by defendant. He represented the defendant; was its vice-principal. Sullivan v. Railroad, 107 Mo. 66; Freiermuth v. McKee, 86 Mo. App. 64; Leeper v. Paschal, 70 Mo. App. 117. See 37 Mo. 341.

SMITH, P. J.—Action to recover damages for personal injuries alleged to have been received.

The petition *inter alia* alleged that while the plaintiff was employed in the service of defendant it became and was his duty to put in place on defendant's track, steel rails and to fix them to crossties with spikes driven therein with mauls; that defendant carelessly and negligently furnished to plaintiff with which to perform his work and service aforesaid a defective appliance, to-wit, a steel maul; that the parts of said maul in and around the hammer thereof (and which parts it was necessary to strike on the spikes in driving them as aforesaid) were brittle and fragile and insufficiently tempered or hardened, so that by reason thereof a piece of said maul slivered, scaled and flew off, and struck plaintiff in his right eye, causing him great physical and mental pain and suffering, and the permanent loss of the sight of said eye; that plaintiff was ignorant of the defective and dangerous character of said maul, but that its defective character was known

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to defendant, or could have been known to it by the exercise of reasonable care on its part.

The answer was a general denial coupled with the plea of contributory negligence. There was a trial resulting in judgment for plaintiff and defendant appealed.

At the conclusion of the plaintiff's evidence and at the conclusion of all the evidence, the defendant asked an instruction in the nature of a demurrer thereto which was by the court refused, and this ruling is made one of the grounds of the defendant's assignment of error here. In view of this, it becomes our duty to determine whether or not, on the evidence adduced for plaintiff, the case was one for the jury.

It appears that the plaintiff was one of what was called an "extra gang" employed by defendant in laying steel rails, taking up old rails, putting in new ones, and doing whatever was required in that connection. Each of the extra gang employed was furnished by the defendant with a steel maul, or hammer, with which to do the work assigned to him. Some of them were jug and others bell-shaped. The plaintiff selected a jug maul and was told by the defendant's foreman to go behind where the new rails had been laid and spike them down so that it would be safe for the trains to pass over them. Just as he started to do this the foreman further told him that if he found a bent spike or saw any one else bend one, to be sure and straighten it up. He told plaintiff to put the maul behind and between the spike and rail and drive it back from the rail, straighten it up, take the maul out and drive it down, but if it was so badly bent that he could not do that, to get a claw bar, pull it out and throw it away.

Plaintiff testified that while doing the work as he had been directed by the foreman he saw a spike that some one had bent and thereupon he said to a co-employee, who was just behind him, "Stick your maul in here; let's straighten this up, and he accordingly put it in and I drove it up" by hitting it once or twice. The spike was in that way bent back from the rail so that

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it could be straightened up. After the maul had been withdrawn and the spike straightened up the plaintiff struck it two licks with his maul, and when he struck the second blow a piece of the maul flew off and struck him in the eye, causing its loss. The plaintiff further testified that after examining this maul prior to the accident and finding only some little pieces broken out of the head of it, he thought with care he could safely use it. After the accident the maul which plaintiff was handling was examined and it was found "that a little piece about the size of a grain of wheat had been broken out fresh." Plaintiff still further testified that the jug mauls furnished by defendant to the men employed on the work with him were generally more or less chipped up—"broken up around on the hammer part." Some had nicks in them "and were slivered and scaled off" and some of them "were breaking once in a while when being used by the men." The bell mauls in use, with one exception, were intact on their face.

Parenthetically, and before making further allusion to the evidence in connection with the defendant's demurrers, it will not be out of place to pass upon the question of the propriety of the action of the trial court in admitting, over defendant's objections, evidence adduced by the plaintiff showing the condition of other mauls than that which caused the injury. As has been previously stated, the heads of the jug-shaped mauls furnished by the defendant to the thirty-five or forty men who were employed by it with plaintiff in taking up old rails and laying new ones in its tracks, were chipped, nicked, broken and slivered, while those having the bell-shape were complete and uninjured. The maul which the plaintiff selected was of the former kind, and though it showed the imperfections very much the same as others of its kind, yet he thought that by the exercise of care he could safely use it in performing the work required of him by defendant.

One of the issues tendered was that the maul furnished plaintiff was defective in that the head of it was so brittle, fragile and insufficiently tempered that while

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the plaintiff was using it in the work assigned to him, a piece of it slivered, scaled and flew off striking him in the eye, etc. Now, the inquiry arises, whether or not from the defective condition of the other mauls of the kind, any inference of fact may be drawn bearing upon the particular acts alleged to be negligent and from which the injury resulted.

The rule prevailing in a majority of the States is, that in an action for negligence, evidence is not admissible of other independent and disconnected acts of negligence as going to show negligence in a particular case. 21 Am. and Eng. Ency. Law, 518 (sec. 3), note 6. And it is said to be fundamental that evidence of any alleged negligent act or omission which could not by any possibility have contributed to the injuries complained of, is admissible. Railway v. Fox, 11 Bush. (Ky.) 495; McNally v. Calwell, 91 Mich. 527.

But where though an act or omission may be in a sense collateral, yet from it an inference of fact may be drawn bearing upon the particular act or omission alleged to be negligent and from which the injuries resulted, evidence thereof is admissible. The application of this rule is variously illustrated in a great number of adjudications. Rose v. St. Louis, 152 Mo. 602; Golden v. Railway, 84 Mo. App. 59, and cases there cited; Golden v. Clinton, 54 Mo. App. l. c. 115; Bailey v. Railway, 139 N. Y. 302; Craft v. Parker, 96 Mich. 245; Railway v. Flanagan, 82 Ga. 578; District etc. v. Ames, 107 U. S. 519; Luetgert v. Volker, 153 Ill. 385; Baxter v. Doe, 142 Mass. 358; Railway v. Hill, 83 Ala. 514; Salem v. Griffin, 139 Ind. 141; Pacheco v. M'f'g. Co., 113 Calif. 541.

As opposed to the trend of these cases we are cited to Railway v. Nelms, 83 Ga. 70. In that case, the plaintiff and others engaged in the same work were furnished with hammers which, as far as could be ascertained by examination, were first-class. Several of them so furnished bursted, their faces split and shelled off; some were new and some were old. It was ruled that "the mere fact that the hammer [referring to the one causing

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the injury] was defective, and that other hammers were defective and that the injury resulted therefrom was not sufficient to authorize the jury to infer negligence on the part of the company." It is further stated in the course of the opinion in the case that "we can not hold that an employer is liable to his servant when he furnishes him an axe, a wagon, a saw, a hammer, or any other tool which appears to be first-class and which subsequently, by some latent defect, breaks and injures the servant." The case while in some of its aspects resembling that under consideration is unlike it as to the condition of the hammer furnished plaintiff and the other men working with him. The hammers in that case, as far as could be ascertained, were first-class; while here, they were "chipped, nicked, slivered and scaled off." Here the defendant did not, as in that, furnish the plaintiff with a hammer apparently first-class in its appearance, so that it may have been properly ruled in the other case that evidence that such apparently perfect hammer burst, split or shelled off was inadmissible to prove the one which caused the injury was defective. We do not think that said case of Railway v. Nelms declares any rule at variance with that declared in the line of cases to which we have referred; but, if so, it stands opposed to a line established by other courts of equal respectability.

Accordingly, we think evidence tending to prove the defective condition of the other mauls of the kind furnished plaintiff was admissible as establishing a fact from which the inference is deducible that the maul furnished plaintiff, and which caused his injury, was likewise defective, and that defendant had knowledge or notice of such defect.

Returning to the consideration of the demurrers questioning the sufficiency of the evidence to carry the case to the jury, it is to be observed that the law imposes upon the employer the duty to use reasonable and ordinary care and foresight in procuring appliances and in keeping them in repair to the end that they may be safe.

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He is not required to furnish those that are absolutely safe. What is reasonable and ordinary care depends upon the nature and character of the appliances and the dangers to be encountered in their use. In order to entitle a plaintiff to recover in an action of this kind he is required to show that the injury was caused by the use of a defective appliance and that the defendant was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. Elliott v. Railway, 67 Mo. 272; Covey v. Railway, 86 Mo. 635.

The employee has the right to presume that the employer will furnish him reasonably safe appliances with which to do the work required of him. And while an employee is not bound to search for latent defects, he must take notice of those which are open to his observation and of which he has knowledge, and if with such information he will use the appliances he does so at his own risk as to the risks arising from known defects, but otherwise if the condition of the appliances is such that he may reasonably suppose he can with care use it with safety. Booth v. Air Line, 76 Mo. App. 516; O'Mellia v. Railway, 115 Mo. 205. And he is required to exercise the care incident to the situation in which he is placed, and whether he exercised that degree of care is a fact for the jury to determine. Thorpe v. Railway, 89 Mo. 650; Conroy v. Iron Works, 62 Mo. 35.

And the rule is well settled that in actions to recover damages for an injury resulting from the use of a defective appliance, the presumption is that the appliance was not defective; and when it is shown that it was, then there is the further presumption that the employer had no notice or knowledge of the fact and was not negligently ignorant of it. Thompson on Negl., section 1053; Pierce on Railroads, 382; Wood on Law of Master and Servant, sections 368-382. The jug mauls were all defective and known to be so by the foreman who had charge of them and the men engaged in their use. He was the vice-principal of the defendant and his knowledge was that of the latter. It is safe to say that the defendant had knowledge of the condition of

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the mauls and with this knowledge it furnished them to the gang of men, of which plaintiff was one, to do the work required of them by its foreman.

And it must be conceded that plaintiff, too, knew of the defect; but he is not to be precluded by that knowledge if he reasonably supposed that by the exercise of care he could have used that furnished him with safety. And the fact that both kinds of mauls were used at the same time, and in exactly the same kind of work, and under the same conditions, and those having the jug shape chipped, split and slivered off while those of the bell shape remained intact, affords a basis for the inference that the former were badly and defectively tempered.

Again, it is said in a Massachusetts case (Moyniham v. Hills Co., 146 Mass. 591) that the fact that an appliance breaks in using it as intended constitutes evidence that it was defective. Here, the jug mauls were all broken. Of this, as has been stated, the defendant had actual notice, or, if not, it had constructive notice. From the manner in which the heads of all the jug-shaped mauls, including that occasioning plaintiff's injury, broke and gave way, it may be inferred that the same were not properly tempered; and this the defendant either knew or could have known by the exercise of reasonable diligence.

While a verdict founded upon inferences having no just basis in the proven facts ought not to stand, and where the grade of proof is such that the inference of an essential fact is a mere speculation, it is the duty of the court to withdraw the case from the jury, we are unwilling to say in this case that there was no evidence from which a just inference might not be drawn by the jury that the maul in question was not defective when furnished plaintiff and that there was not a negligent failure to discover it before the time when plaintiff was injured by it. We can not, therefore, resist the conclusion that the case was one for the jury and not for the court.

The defendant further insists that the plaintiff was

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guilty of contributory negligence in striking his maul against that in the hands of another employee, but as the foreman ordered plaintiff to use it in that way we can not discover that in obeying this order he was guilty of contributory negligence. The plaintiff had the right to rely on the defendant's superior knowledge and judgment as to the strength of the maul and its adaptability to the use to which he was directed to make of it. The defendant's foreman having directed the plaintiff in case he found a bent or "goose-neck" spike to straighten it up by inserting a maul between it and the rail and then striking it with another, was in effect an assurance that it was safe to handle the mauls in that way. The plaintiff knew to a certain extent of the defect in the head of the maul, but he did not know of the danger to which he would be subjected by reason of the defect which the foreman knew, or would have known had he discharged his duty towards plaintiff. Sullivan v. Railway, 107 Mo. 66.

The plaintiff was an ignorant and illiterate man, not even able to write his name; young, being but twenty-two years of age; and having no experience in the use of mechanical appliances beyond that acquired during the twenty-five days he had been in the defendant's employ; and we find nothing in the evidence to warrant the inference that he either knew or ought to have known that the maul furnished him was unfit or not intended to be used for straightening bent or "goose-neck" spikes by striking said maul against another, as ordered by defendant's foreman; or that the plaintiff knew, or ought to have known, the danger to be thereby incurred, or that he appreciated the risk incidental to such use; and, therefore, defendant can not, as a matter of law, hold him guilty of contributory negligence or that he assumed the risk. Beach on Contributory Negl., section 68; Railway v. Meyers, 18 U. S. App. 569; Murtaugh v. Railway, 49 Hun 456.

And as to whether the plaintiff's injuries were occasioned by striking a spike with his maul or by strik-

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ing it against another, was a controverted issue of fact for the jury. Duerst v. Stamping Co., 163 Mo. 607.

The defendant's seventh instruction was by the court modified and then given. It is as follows: "The court instructs you that the plaintiff was only justified in using the maul furnished him for the purpose for which it was intended, *or for such purpose as was authorized by defendant;* and if you further find from the evidence that it was not designed or intended that such mauls should be used by striking one against another, and that such use of the mauls was liable to cause pieces of one or the other of them to break and fly into the air, thereby endangering the persons using them, and that a person of ordinary care and prudence engaged in the business of laying railroad track would not have so used one of such mauls, *unless thereto directly authorized by defendant*—then if you further find from the evidence that the plaintiff was injured by a piece breaking from one of said mauls and striking him in the eye in consequence of his striking the maul which he was using against another maul in the hands of a co-employee, working with him at the time, then the plaintiff was guilty of such negligence as precludes a recovery, and your verdict must be for the defendant." The *italicised* words indicate the modification just referred to.

The defendant objected that the amendment shown by the italics enlarged the plaintiff's right to recover beyond anything alleged in his petition, and was to that extent erroneous. We are unable to perceive that the modification was not within the limits of the issues tendered by the petition, but if so, still there was no error in giving it, for the reason that the evidence on which it was based was received without objection. In such case the plaintiff was entitled to have the modification included in the hypothesis of the defendant's instruction. If the plaintiff was directed to use the maul in a particular way or in doing certain work and was injured in so doing, he was not, as we have seen, thereby guilty of contributory negligence. The defendant not having objected to such evidence at the time of its in-

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troduction, it was too late afterwards by an instruction expressly or impliedly to do so. Friermuth v. McKee, 86 Mo. App. 64; Leeper v. Paschal, 70 Mo. App. 117. And it was proper for the court to instruct the jury upon the legal effect of such evidence. Railway v. Moore, 37 Mo. l. c. 342. The cases referred to by defendant are not analogous to this, and what is decided by them has no bearing on the question under consideration. We think the court committed no error in modifying defendant's seventh instruction.

After looking at the evidence in its entirety we can not say the case was not one for the jury, or that the verdict is not supported by it. It results that the judgment must be affirmed. All concur.

WILLIAM MAGEE, Respondent, v. W. H. VERITY et al., Appellants.

Kansas City Court of Appeals, January 5, 1903.

1. **Building and Loan Associations:** COMPETITIVE BIDDING: PREMIUM: USURY. Where there is no competitive bidding for preference of a loan, the statute on building and loan associations does not protect the loan from the vice of usury.

2. ———: USURY: PARTICIPATION: SETTLEMENT. Where a borrower settles with the association and receives a part of the money earned by his and other usurious contracts, he is bound by such settlement and can not plead usury in his own contract.

3. ———: SETTLEMENT: FRAUD. Where there is no fraud in obtaining the signature of the maker to a settlement, he will not be permitted to show that such paper does not contain the contract. (Crim v. Crim, 162 Mo. 544, followed.)

4. ———: FRAUD: SIGNING UNREAD CONTRACT. Mere falsely representing to a man in possession of his faculties and able to read, that a writing involves the verbal understanding of the parties, is not the fraud which will set aside a contract.

5. ———: SETTLEMENT: ABANDONMENT. If a settlement has been abandoned and never recognized by the parties thereto, it is of no force.

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Appeal from Schuyler Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

REVERSED AND REMANDED.

Smoot, Fogle & Eason for appellants.

(1) The court erred in holding the contract of November 25, 1896, void. Plaintiff admitted its execution. The burden was on him to show such fraudulent acts on the part of the agent of the association as would vitiate it. He who charges fraud must prove it by preponderance of the evidence to the satisfaction of the court, and such evidence must be clear, convincing and conclusive. Forrester v. Schofield, 51 Mo. 268; Jackson v. Wood, 88 Mo. 76; Kaiser v. Gammon, 95 Mo. 217; Shoe Co. v. Miller, 53 Mo. App. 640; Fenniwick v. Bowling, 50 Mo. App. 516; Lithograph Co. v. Obert, 54 Mo. App. 240; Kingman v. Shawley, 61 Mo. App. 54; Saunders v. McClintock, 46 Mo. App. 216; Davidson v. Hobson, 59 Mo. App. 130; Wannell v. Kem, 57 Mo. 478. (2) Plaintiff could read and write—was a man of ordinary intelligence. The contract was printed with blank spaces filled in in writing. He took it in his hands. He signed it. He acknowledged it in solemn form before his legal adviser, Mr. Gray. It was his duty to have ascertained what he was signing. Railroad v. Clearly, 77 Mo. 634; Leonard v. Railroad, 54 Mo. App. 293. The law presumes he read it and understood its contents. Nichol v. Young, 68 Mo. App. 453, and cases there cited; Campbell v. Van Houten, 44 Mo. App. 231; Anderson v. McPike, 86 Mo. 293; Bigelow on Fraud, 87; Development Co. v. Silva, 125 U. S. 259; Nichol v. Young, supra; Warren v. Richey, 128 Mo. 311; 14 Ency of Law (2 Ed.), 112; Eaton on Equity, 298; Hadley v. Geissler, 90 Ill. App. 565. (3) Plaintiff, by his contract of November 25, 1896, accepted the profits of his usurious contract. By this voluntary act he is estopped from asking relief. State ex rel. v. Stockton, 85 Mo. App. 477.

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Higbee & Mills and *S. W. Mills* for respondent.

(1) As between the original parties if one has procured the signature of the other to a written instrument, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he can not be permitted to avail himself of the writing, but must stand by the real contract. Wright v. McPike, 70 Mo. 175; Johnson v. Life Ins. Co.; decided by this court, April 7, 1902. (2) The assignee succeeds only to the rights of the assignor. Drew v. Baldwin, 27 Mo. App. 44; In re Excelsior Mfg. Co., 164 Mo. 316. (3) The evidence is clear and uncontradicted that plaintiff relied implicitly on the statements of the anonymous agent; believed everything connected with the association "was honest clear through." The relations were confidential. That Gray may have confirmed his faith does not alter the complexion of the case. Becraft v. Grist, 52 Mo. App. 586; Hickam v. Hickam, 46 Mo. App. 499, 506; The Beck, etc., Co. v. Obert, 54 Mo. App. 240, 248. (4) The monthly interest payment, $2.40, is equivalent to seven and two-tenths per cent. The evidence shows clearly that eighty-five monthly payments of $6, more than paid the note in full, reckoning the interest at that rate. But, being usurious, interest will be reckoned at six per cent. There were one hundred and two monthly payments made by plaintiff, $612, while the association was solvent and doing business. It was rock-ribbed and sound to the core on February 28, 1900, as appears by the semiannual statement made by defendant Verity, as secretary, in which the president joined, both under oath.

ELLISON, J.—This is a proceeding in equity to cancel a note and deed of trust and restrain a sale thereunder. The decree in the circuit court was for plaintiff.

Plaintiff became a member of the Missouri Guarantee Savings and Building Association which company afterwards made an assignment and defendant Verity

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was made assignee. Plaintiff borrowed of such association $400, giving his note containing a contract that plaintiff was to pay the association on the twentieth of each month, two dollars on his stock; one dollar and sixty cents for premium and preference in the loan, and two dollars and forty cents interest, making a total of six dollars per month. The interest charge, together with the charge made for preference of loan, exceeded the rate allowed by law. Therefore, if it be true, as the evidence tended to show, that there was no competitive bidding for preference of loan, the statute on building and loan associations (in force at date of loan) will not protect the loan from the vice of usury. Brown v. Archer, 62 Mo. App. 277, and like cases since decided. And, assuming that plaintiff's calculations of amounts paid were correct, he would be entitled to a cancellation of the note and deed of trust unless for the following consideration:

Defendant charges, by answer, that after the note aforesaid had been running for a long space of time and many payments had been made, there was a settlement in writing between plaintiff and the assignee aforesaid wherein the note and all payments made by plaintiff and all profits due him were adjusted and a new obligation entered into by plaintiff; thus bringing the case within the rule laid down in State ex rel. v. Stockton, 85 Mo. App. 477; Covey v. Building and Loan Ass'n (not yet reported). In those cases the rule is stated and the reason given therefor, that if a borrowing member of a building and loan association who has taken a loan outside the protection of the statute and thereby infected with usury, afterwards makes a settlement with the association and takes to himself a part of the money earned by his and other contracts, he is bound by it.

But conceding such to be the law, plaintiff charges that the settlement did not contain the contract between the parties and was also obtained by fraud, and is therefore not binding on him. He contends that even though the settlement was not obtained by fraud, yet he had a

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right to show that it did not contain the contract between the parties, and cites Wright v. McPike, 70 Mo. 175, in support of his assertion. That case sustains plaintiff's position, but it has been lately overruled by the Supreme Court and declared not to state the law. Crim v. Crim, 162 Mo. 544.

There is no evidence whatever to sustain the charge of fraud. The plaintiff, a man who can read and write, signed the paper without reading it. He did, however, take it to his neighbor, a business man of experience, and, on his advice, signed it. Plaintiff can not be allowed to show that the written paper signed by him does not contain the contract. If a party is induced to sign a contract by fraud, he can, of course, avoid it for that reason. It is, however, clear that merely falsely representing to a man in possession of his faculties and able to read, that a writing embodies their verbal understanding, is not the fraud the law means. Johnson v. Ins. Co. (not yet reported). These considerations make it necessary to reverse the judgment.

But something was said at the argument, as well as at the trial, that the new agreement or settlement was never recognized by the parties after it was made. Evidence as to this may develop further on, at another trial, and we will therefore remand the cause. If it be true that a settlement was made but abandoned and never recognized, it could be of no force.

Reversed and remanded. All concur.

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MARTHA K. O'REILLY, Respondent, v. HENSON & ALLEN, Appellants.

Kansas City Court of Appeals, January 5, 1903.

1. **Justices' Courts:** CHANGE OF VENUE: JURISDICTION: STATUTORY CONSTRUCTION. Under section 3973, Revised Statutes 1899, a justice of the peace has no further jurisdiction of a cause on the filing of a proper application for a change of venue, except to grant such change.

2. ———: ———: ———: ———: WAIVER. After the filing of an application for a change of venue and its refusal, the defendant may abandon the cause or he may continue to take part in the trial and defend himself, and such conduct will not waive his objection to the jurisdiction as long as the application is not withdrawn.

3. **Appellate Practice:** RESTITUTION: JURISDICTION. An appellate tribunal, invested with authority to reverse, annul or revise judgments, has authority to restore parties to the *status quo* before the annulled judgment and on application should do so; and the fact that the courts below and the appellate court may have had no jurisdiction of the matter involved can not defeat the power to order restitution.

Appeal from Nodaway Circuit Court.—*Hon. Gallatin Craig,* Judge.

Reversed *(with directions).*

B. R. Martin and *W. C. Ellison* for appellants.

Filed lengthy argument.

Alderman & Cummins, C. A. Anthony and *J. L. Funk* for respondent.

(1) When defendants' motion for change of venue was overruled, the defendants "by agreement" submitted the case to the justice, took part in the trial and as the "complaint" is admitted sufficient, the justice had

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jurisdiction of the subject-matter, and of the person by voluntary appearance. They could not submit to the jurisdiction—if results were favorable, hold—if unfavorable, cry want of jurisdiction. Benswick v. Cook, 110 Mo. 182; Baker v. Railroad, 107 Mo. 239; Orear v. Clough, 52 Mo. 57; Carter v. Wamack, 64 Mo. App. 341; Baisley v. Baisley, 113 Mo. 551; Tower v. Moore, 62 Mo. 120; Kronski v. Railroad, 77 Mo. 368; Blackwood v. Jones, 27 Wis. 498; Griffin v. Van Meter, 53 Mo. 430; Blackwood v. Jones, 27 Wis. 500-1; State v. Hoffman, 75 Mo. App. 385; Jones v. Pharis, 59 Mo. App. 264; Endicott v. Hall, 61 Mo. App. 186.

ELLISON, J.—Plaintiff begun an action of unlawful detainer before a justice of the peace. On the day set for trial the parties appeared and defendants filed an application for change of venue on account of the prejudice of the justice. This application was overruled. Defendants thereupon asked a continuance grounded on the statement that they had expected the venue to be changed. The continuance was refused and the trial was proceeded with, the defendants taking part therein. No further reference to the application for change of venue was made by either of the parties. Judgment was rendered for plaintiff and defendants appealed to the circuit court. The cause coming up in the latter court a day was agreed upon for trial. At the beginning of the trial the defendants objected to the introduction of any evidence by plaintiff on the ground that the court had no jurisdiction. The objection was overruled, and the trial proceeded to judgment for plaintiff, the defendants participating therein. They then duly appealed to this court.

Since the circuit court could only obtain jurisdiction through the justice of the peace, the question presented is, had the justice jurisdiction of the cause? The statute relating to changes of venue is that they must be granted on affidavit for certain enumerated causes; and by an amendment it reads, "that when such affidavit for a change of venue shall be filed, the justice shall have

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no further jurisdiction in the cause, except to grant such change of venue." Sec. 3973, R. S. 1899. It is plain that the mere application, in due form, ousts the justice of jurisdiction of the case. State ex rel. v. McCracken, 60 Mo. App. 655; Jones v. Pharis, 59 Mo. App. 254. We do not understand plaintiff to deny this; but her insistence is, that defendants waived the question of jurisdiction by taking part in the trial before the justice and in the circuit court. Defendants did not waive jurisdiction unless they waived the application: for as long as the application stands, jurisdiction, under the terms of this statute, is necessarily ousted. It had always been held in this State, prior to the amendment, that taking part in the trial was not an abandonment of a prior application for change of venue. Colvin v. Six, 79 Mo. 198; State ex rel. v. Six, 80 Mo. 61. The party desiring the change could proceed with the trial and, if defeated, could appeal and reverse the judgment made erroneous by the wrongful refusal of his application. The only difference made by the statute aforesaid is that a judgment rendered after a wrongful refusal is not merely erroneous, but void, for want of jurisdiction in the court. Prior to the amendment to the statute, if a party's application was overruled he was compelled to go to trial or appeal, else the judgment would be binding upon him. Now he is not compelled to do either in order to protect himself, since the judgment would be void, but neither is he compelled to abandon the case. There is no inconsistency in taking part in the trial and at the same time insisting that he should have been granted a change of venue.

A proper application for removal of a cause from a State to a Federal court ousts the former court of jurisdiction and renders any further acts of that court *coram non judice.* Yet the Supreme Court of this State, and the Federal courts, hold that taking part in the trial after a refusal to order the removal by the trial court is not a waiver. Herryford v. Insurance Co., 42 Mo. 149; Stanley v. Railroad, 62 Mo. 508; Railroad v. Ford, 35 Fed. Rep. 170.

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We therefore rule that an appearance and taking part in the trial after an application for change of venue has been overruled, is not a waiver of the application and does not reconfer jurisdiction of the cause.

It appears that a writ for the possession of the premises was issued in plaintiff's behalf, returnable to the next term of the trial court, though it does not appear whether it has been executed. It is one of the powers of an appellate tribunal invested with authority to reverse, annul or revise judgments, to restore parties to the *status quo* before the judgment. They may, therefore, and should, on application to that effect, render judgment for the restitution of the property. 18 Ency. Plead. and Prac., 889, and authorities there collected.

It is no objection to an order of restitution that the court trying the cause had no jurisdiction. The court, in common justice, should, and does retain the power to undo what it wrongfully did, i. e., by restoring the parties to their situation before the wrongful interference. Northwestern Fuel Co. v. Brock, 139 U. S. 216.

The judgment of the trial court will therefore be reversed and judgment entered here that defendants have restitution of the premises and for all costs by them expended; including $20.40 for printing abstract. The other judges concur.

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JOHN W. DOUGHERTY, Respondent, v. ABRAHAM C. SNYDER, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Trial Practice:** TWO COUNTS IN PETITION: FINDING ON ONE. Where there are two counts in the petition and the verdict is for the plaintiff on one count, silence as to the other count is in effect a finding for the defendant.

2. **False Imprisonment:** INFORMATION OF INSANITY: EVIDENCE: THREATS. In an information filed in the probate court as to plaintiff's insanity, it was stated that he had threatened the life of the defendant. Subsequently plaintiff sued defendant for false imprisonment under a warrant issued on the information by the probate judge. *Held,* it was error on the trial not to permit the plaintiff in testifying in his own behalf to answer the question whether he had not threatened defendant's life two days before the filing of the information.

3. ———: INSANITY: PROBATE COURT: INFORMATION: JUDICIAL ACTION. Upon the filing of an information as to the mental unsoundness of a citizen of the county, the probate court has jurisdiction to inquire into the matter, and, if satisfied of the propriety thereof, to issue his warrant for the arrest and detention of such party; and in so doing the court acts judicially and a warrant so issued, though improvident and wrongful, protects the informant against an action for false imprisonment.

4. ———: MALICIOUS PROSECUTION: REMEDY: COSTS. The remedy of one who is unjustly imprisoned is by recovery of costs which may be awarded him, or the redress afforded by some statute or by action for malicious prosecution. (Authorities cited and distinguished.)

5. ———: ———: ACTION. No action for false imprisonment lies against one who in good faith files his information with the probate judge touching the sanity of a citizen of the county. There must be *mala fides* or the proceeding must be a sham.

6. ———: ———: HUNG JURY: DISMISSAL. The fact that an informant, after the disagreement of a jury as to the sanity of the person informed against, requested a dismissal of the proceeding, is of little or no importance in the absence of other facts showing *mala fides.*

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Appeal from Nodaway Circuit Court.—*Hon. Gallatin Craig,* Judge.

REVERSED AND REMANDED.

W. C. Ellison and *E. A. Vinsonhaler* for appellant.

(1) Defendant Snyder and his partner Wilson had a right, under the allegations in their affidavit, to apply to the probate judge for the apprehension of Dougherty. If he was furiously mad, and threatening to kill Snyder and destroy the property of both, then clearly it was within the power of the probate judge to "cause such insane person to be apprehended and employ any person to confine him or her in some suitable place until the probate court shall make further orders therein." Revised Statutes 1899, sec. 3695. (2) No bonds in such a case can be taken, and when, as here, plaintiff asked for a continuance and was placed in charge of his father-in-law, the judge acted judicially and was only doing what the statute plainly required. So in regard to Snyder's complaint to the sheriff. It was no more than a request of the officer to keep in his custody the plaintiff Dougherty; and such request resulted in nothing further than the officer was bound to do under his warrant. Every step was under the warrant—no restraint except such as was required by it was imposed. (3) Even malicious motives, or want of probable cause, do not give a party arrested an action for false imprisonment. (4) The warrant is a complete protection in this case and plaintiff's instruction No. 3 is clearly error. (5) The court is referred to rulings on the evidence offered as to insanity of plaintiff and his threat to kill Snyder. To exclude this evidence and then submit the issue to the jury is so clearly error as to require no citations.

C. A. Anthony for respondent.

(1) The defendant seeks to justify under section 3695. "It is elementary law that one who would justify

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himself under a statute must pursue the statute." Lock v. Dean, 11 Am. R. 327; McCasky v. Garrett, 91 Mo. App. 354; Monson v. Rouse, 86 Mo. App. 101; Cox v. Osage County, 103 Mo. 390. Indeed, if this were not so, the statute would be unconstitutional. Smith v. People, 65 Ill. 375, 379. (2) Appellant seems to argue that if a person in any kind of a case has any kind of a warrant issued, he must be prosecuted for malicious prosecution and harshly refers to Finley v. Refrigerator Co., 99 Mo. 559. "It makes no difference whether the restraint of the person is caused without process, or under color of process wholly illegal." Ahern v. Collins, 39 Mo. 150; Fellows v. Goodman, 49 Mo. 63; Monson v. Rouse, 86 Mo. App. 97; McCaskey v. Garrett, 91 Mo. App. 354; Boeger v. Langenburg, 97 Mo. 396; Cooley on Torts (1 Ed.), p. 177. (3) The warrant not authorized by law, the defendant not only had affidavit filed with Judge Tate but demanded the warrant, directed the arrest, complained that the officer did wrong in letting Dougherty go with Mr. Cramer, had the sheriff go to Cramer's, keep surveillance over Dougherty through the night, objected to his release next day, employed an attorney to conduct a trial unknown to law—certainly these facts not only make Snyder liable but show a spirit of persecution. Knowles v. Bullene, 71 Mo. App. 341; Bissell v. Gold, 19 Am. 484, 490; McCaskey v. Garrett, 91 Mo. App. 354; Floyd v. State, 12 Ark. 43; 54 Am. Decisions 252, note page 259; Veneman v. Jones, 118 Ind. 41; 10 Am. St. 100; Monson v. Rouse, 86 Mo. App. 101, 103; Bonesteel v. Bonesteel, 28 Wis. 253; Schell v. Leland, 45 Mo. 294; Wise v. Loring, 54 Mo. App. 264; Bath v. Metcalf, 145 Mo. App. 214; 1 Am. State Rep. 455. (4) To establish his case plaintiff is only required to show the imprisonment, and that done, it devolves upon the defendant to prove that he was justified. Floyd v. State, 54 Am. Dec. 252. (5) It certainly can not be the law of Missouri that any man may treat a person whom he claims "furiously mad" as a criminal, cause his arrest at his place

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of business, drag him from his home and family, expose and humiliate him and not be liable. And the statute certainly never intended to give the power to any one to treat him as a criminal. The proceedings in probate court to have him adjudged a lunatic and incapable of managing his affairs are in their character civil proceedings. The notice takes place of a summons. Crow v. Meyersink, 88 Mo. 411; State v. Baird, 47 Mo. 301-304; Kiehns v. Wessel, 53 Mo. App. 669; Rafael v. Vervelft, 2 Wm. Blackstone 987; Smith v. People, 65 Ill. 375, 378.

SMITH, P. J.—This is an action which was brought to recover damages for a wrongful arrest and detention. The petition was in two counts. At the trial there was a finding by the jury on the second for plaintiff, but none whatever on the first. This under our practice, was in effect a finding for the defendant on the latter; but as the plaintiff has made no complaint as to that and has not appealed that count, and the proceedings relating to the trial on it are not now in any way before us for review, it need not be further noticed. In the second it was alleged that the defendant unlawfully and wrongfully arrested and caused the arrest and detention of the plaintiff, etc.

The answer alleged that defendant, in good faith filed before M. G. Tate, the judge of the probate court, an information stating that plaintiff was so far disordered in his mind as to endanger his own person and property and the person and property of others. "That defendant is informed and believes that upon said affidavit said judge of the probate court did issue a warrant for the apprehension of said plaintiff upon said grounds so alleged and that the imprisonment complained of in the petition was for the acts of the officer, sheriff and his deputies, under said warrant and that defendant in no other way interfered therein."

It appears from the very meagre abstract of the record presented that the plaintiff had been confined in a lunatic asylum for some form of insanity and had so

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far recovered that he had been discharged and later on had engaged in a mercantile business. The defendant and another filed an information before the probate judge of the county stating that the plaintiff herein was a resident of the county, having a large amount of property therein, and was and for some time past had been so far disordered in his mind as to endanger his own person and the person and property of others. It was also further stated that at a certain time and place the said plaintiff had threatened to take the life of the defendant and to destroy his property.

It further appears that the probate judge before whom the said information was filed, being satisfied there was good cause for the exercise of his jurisdiction, issued a warrant for the apprehension and restraint of plaintiff until the alleged information could be inquired into by a jury. The said plaintiff was immediately apprehended under the warrant by the sheriff and placed in the care and custody of his father-in-law where he remained until there was an inquiry by a jury in the said probate court touching the truth of the allegations made by the defendant in said information so filed before the judge of said court. The jury, it seems, after hearing the evidence produced before it, were unable to agree. The said plaintiff upon the motion of the defendant was discharged. It further appears that while the plaintiff was in charge of the sheriff under the warrant, that defendant suggested to him that he ought not to let him (plaintiff) go out of his charge, and that in his opinion it would be necessary to put handcuffs on him.

During the progress of this case the plaintiff, who was a witness in his own behalf, testified that his feelings towards the defendant were none the best. The defendant inquired of him whether or not he had not at a certain time (two days before the information was filed) and place, in the presence of a certain person—naming him—threatened the life of the defendant? On objection of plaintiff's counsel he was not permitted to answer. It seems to us that this was a proper question

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and that the plaintiff should have been allowed to answer it. Evidence of the kind called for by defendant's question tended to show the defendant's good faith in filing the information, and for that reason we think it was admissible.

The information and the issue of the writ for the apprehension of plaintiff was authorized by sections 3650, 3651, 3694, 3695, Revised Statutes 1899. The plaintiff's cause of action is based on the illegality of his arrest and detention, and since it clearly appears from the evidence that the arrest and detention was made in due course of regular proceedings of the probate court—a court having complete jurisdiction of the subject-matter of the information—how could an action for false imprisonment or for "illegal and wrongful arrest and detention" be maintained in such case?

The facts stated in the information to the probate judge were unquestionably sufficient, under the statutes already referred to, to give that officer jurisdiction. Said probate judge could not issue the writ without being first satisfied that there was good cause for the exercise of his jurisdiction. In issuing the writ he acted judiciously and made a judicial determination. It was the result of regular judicial action of a judicial officer having jurisdiction upon the facts presented to him by the information to issue it. A warrant issued under such circumstances, even though improvidently and wrongfully, protects against an action for false arrest and imprisonment the person who instigated it. This exemption is founded on public policy and is applicable alike to civil and criminal proceedings, that persons may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy for their grievances without the risk of undue punishment for their own ignorance of the law, or for the errors of courts and judicial officers.

The remedy of one who is unjustly arrested or imprisoned, or both, is by the recovery of the costs which may be awarded him, or the redress which some statute may afford him, or by an action for malicious prosecu-

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tion, in case the prosecution against him has been from unworthy motives and without probable cause. Finley v. Refrigerator Co., 99 Mo. 559; Marks v. Townsend, 97 N. Y. 590; Fischer v. Langbein, 103 N. Y. 84; Carman v. Emerson, 71 Fed. Rep. 264; Williams v. Smith, 14 C. B. (N. S.) 596; Chrisman v. Carney, 33 Ark. 321. This case is not analogous to that of Fellows v. Goodman, 49 Mo. 63, where there was an arrest upon an affidavit before a justice of the peace charging the defendant therein with maliciously injuring a building. In an action for false imprisonment against the person who made the affidavit for the arrest, it was shown that the proceeding was a sham, though made under the forms of the law was *mala fide,* and it was held that an action for false imprisonment could be maintained in such case.

Nothing has been discovered in the record of the present case which tends in the least to show that the proceeding before the probate court was a sham or that it was *mala fide.* The plaintiff and the defendant resided in the same village, and the former had just been released from an insane asylum and had threatened the life of the latter. Taking all the facts and circumstances together which the evidence discloses and the clear inference to be deduced therefrom is that the defendant acted in the utmost good faith in setting on foot the inquiry into the mental condition of the plaintiff. It seems to us that the record is barren of any evidence tending to show the proceeding was *mala fide,* or a sham.

Nor is this case like Ahern v. Collins, 39 Mo. 150, for there the arrest and detention was not under a writ which was the result of regular judicial action by a judicial officer having jurisdiction, while here it was. And the arrest and detention in that case was made on process, so that there is no similarity between the two cases in any of their essential features. As was said by us in Monson v. Rouse, 86 Mo. App. loc. cit. 102: "In order to make a case of false imprisonment, malice and want of probable cause are not necessary ingredients. There may be false imprisonment without the

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existence of malice or want of probable cause. These are necessary in law for malicious prosecution but not for false imprisonment.'' The case then before us was that where the warrant under which the defendant was arrested and detained was unauthorized and illegal, so that it is not in point here.

If the defendant believed the plaintiff was so far disordered in his mind as to endanger his own person or the person or property of others, he was authorized, both under the statute already referred to and at common law (Bishop's Non-Contract Law, section 510), to give the information of that fact to the probate judge of the county to the end that the fact be inquired into by a jury; and for giving this information and for the action of the probate judge in issuing the warrant and for the apprehension of plaintiff and his detention until the inquiry could be made, an action for *false imprisonment* can not be maintained unless he acted in the steps he took in that direction *mala fide,* or unless the proceeding thus instituted was a *sham.*

This is an action for false arrest and imprisonment and not for malicious prosecution, and no good reason is seen for the refusal by the trial court of the defendant's instruction telling the jury that under the pleadings and evidence the verdict should be for defendant.

It may not be out of place to say that while the warrant issued by the probate judge was not in the best form, yet we observe nothing in any part of it that rendered it illegal or that resulted in any special injury to plaintiff.

Nor do we discover anything in the action of the defendant in requesting the proceeding to be discontinued that is worth while to be noticed. It may have been that the inquiry into the mental condition of the plaintiff by the jury had the effect to convince defendant's mind that he was in error as to the truth of the facts stated by him in the information, and for that reason he felt it to be his duty to discontinue the proceeding. His action did not necessarily show his bad faith in the proceeding, or that it was a sham. We at-

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tach little or no importance to the discontinuance in the absence of more evidence.

Without noticing other points suggested in briefs of counsel, it is sufficient to say that the judgment, which was for plaintiff, was for the wrong party and must be reversed and the cause remanded. All concur.

EMILY I. ROBINSON et vir, Respondents, v. CITY OF ST. JOSEPH, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Street Grading:** DAMAGES: FORMER AND LATER CHANGE OF GRADE. In an action by a lotowner to recover damages for a change of grade in the street along the side of his lot, it is no defense that he had not used the money recovered in an action for changing the grade of a street in front of his lot some years before to reduce the grade of his lot so that the later change of grade would have been no injury to his lot.

2. ———: ———: VALUE OF PROPERTY. The measure of damages for changing the grade of a street is the difference between the market value of the lot immediately before the injury and immediately after the completion of the injury.

3. **Witnesses:** EXPERT: QUALIFICATION: VALUE. Witnesses, residents of a city and acquainted with the lots in question, are qualified to give their opinions as to the difference in the value of the lots before and after a change of grade in the street, and they need not be engaged in the real estate business.

4. **Evidence:** STREET GRADING: PHOTOGRAPHS. In an action to recover damages for changing the grade of a street photographs of the *locus in quo* after the completion of the injury, if proven to be true, are admissible in evidence.

5. ———: PRACTICE: REMARK OF COURT. In an action to recover damages for changing the grade of a street, where the defendant was offering to prove the effect of a prior change of grade of a street on another side of the lots, the remark of the court, "The question is, what the lots were worth immediately before the grading was done and immediately after. Penn Street is just the same as if a ravine was there," is held harmless error, if improper.

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6. ———: REJECTION OF MATTER ALREADY IN: HARMLESS ERROR. The refusal on objection to admit certain evidence of a fact which is amply shown by other evidence unobjected to is harmless error.

7. **Instruction:** ABSTRACTION: HARMLESS ERROR. Where an instruction enunciating a proper rule of law is preceded by an axiomatic abstraction, the matter is harmless, but the practice is rather to be condemned than commended.

8. ———: ISSUES. Where an instruction embraces within its hypotheses the facts constitutive of plaintiff's case and within the issues, it is a proper expression of the law.

9. ———: EMBRACED IN OTHERS: REFUSAL. Where an instruction contains a proposition fully and clearly enunciated in other instructions, there is no impropriety in refusing it.

Appeal from Buchanan Circuit Court.—*Hon. A. M. Woodson,* Judge.

AFFIRMED.

Kendall B. Randolph for appellant.

(1) The court erred in sustaining the motion to strike out parts of the answer. There can be no doubt but that such ruling would have made a material difference in the verdict. As the case now stands these parties have recovered $3,000 from the city for grading around their property, in the outskirts of the city, with a small seven-room house and some sheds on it. Donnell v. Wright, 147 Mo. 639; State ex rel. v. Branch, 134 Mo. 592; Short v. Taylor, 137 Mo. 517; State ex rel. v. St. Louis, 145 Mo. 551; Spradling v. Conway, 51 Mo. 51; McKee v. Railway, 49 Mo. App., l. c. 180; Hulett v. Railway, 80 Mo. App. 87. (2) The court erred in admitting in evidence the photographs, as they were not shown to be correct representations of the situation. Baustian v. Young, 152 Mo. 317. (3) The court erred in permitting witness Giles to testify as an expert. He possessed none of the qualifications of an expert. He was not shown to possess any knowledge except what might have been expected of any of the jurors. Such

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evidence is misleading and was prejudicial to the defendant. Turner v. Hoar, 114 Mo. 335; Goins v. Railroad, 47 Mo. App. 173; Helfenstein v. Medart, 136 Mo. 595; Naughton v. Stagg, 4 Mo. App. 271; Thompson v. Ish, 99 Mo. 160; Gates v. Railway, 44 Mo. App. 488; Benjamin v. Railway, 133 Mo. 274. (4) The court erred in not permitting the witnesses to answer defendant's questions in reference to Penn street, the object of which was stated by defendant's counsel to be, "to show the difference about Penn street being graded or not graded as to what effect it has on the property." (5) The court also erred in ruling and stating in the presence of the jury as follows: "The question is, what was the property worth immediately before this grading was done and immediately after. Penn street is just the same as if there was a ravine there." Why didn't the court say, "Penn street is just the same as if it were on a level with the property?" That would have been perfectly fair to plaintiffs. Bank v. Armstrong, 92 Mo. 265; Rickroad v. Martin, 43 Mo. App. 597. (6) The court erred in giving, on behalf of plaintiffs, instruction No. 2. This instruction opens with a dissertation on the law with the evident purpose of inflaming the jury with the idea that the city had willfully violated the Constitution, and should be punished therefor. What could the jury understand by the term "as provided by law?" Bradley v. Railroad, 138 Mo. 293. (7) Defendant's refused instruction marked "A" should have been given. It states the law correctly governing damages in grading cases.

H. S. Kelley for respondent.

(1) The first matter complained of by appellant is, that the court erred in sustaining the motions to strike out parts of defendant's amended answers. We do not think so. (2) The photographs were shown to be correct representations of the situation, and were properly admitted in evidence. Baustain v. Young, 152 Mo. 317; Kent v. St. Joseph, 72 Mo. App. 42. (3)

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Giles was not an expert real estate dealer, but he was an intelligent citizen, an ex-alderman of the city, and said he knew something about the value of real estate in that neighborhood—was as much acquainted with the value of real estate as any man who was not a real estate man. With this qualification he was permitted to testify. Tate v. Railroad, 64 Mo. 149; Schaaf v. Fries, 77 Mo. App. 346; Railroad v. Calkins, 90 Mo. 538; Railroad v. DeLissa, 103 Mo. 125; Hosher v. Railroad, 60 Mo. 303; Thomas v. Mul, 43 Mo. 58; State v. Darrah, 152 Mo. 522. (4) As to the fourth, fifth and sixth points made by appellant, we will simply say that they are all of the same nature and effect as the first, and present the same theory contended for by defendant.

SMITH, P. J.—The plaintiff, Emily I. Robinson, was the owner of lot 24, block 13, in Wyatt's addition to the defendant city, and the other plaintiff, H. N. Robinson, was the owner of lot 23 in said block and addition to said defendant city. Penn street runs east and west through said city of St. Joseph and is intersected by Twenty-eighth street running north and south. Plaintiff's lots front on Penn street 100 feet, and on Twenty-eighth street 127 feet, and are on the northwest corner of said named streets.

In the year 1890 the defendant city established the grade on said Penn and Twenty-eighth streets which at their intersection was the same. Shortly after the establishment of the said grade, the defendant by ordinance caused the natural surface of Penn street at said intersection and in front of plaintiff's lots to be brought thereto and thereby made a cut of twenty feet in front of plaintiff's lots so that on the boundary line between said lots and Penn street there was a perpendicular earthen bank something like twenty feet in height. Prior to the establishment of said grade the plaintiffs, who are husband and wife, erected a mansion house on said lots, together with other buildings used therewith, and also planted fruit and ornamental trees, shrubs, etc., thereon.

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Each of the plaintiffs sued the defendant for the injury to their respective lots occasioned by the grading of Penn street and recovered a judgment, one for $1,200 and the other for $300.

More than ten years later the defendant city by a further ordinance caused Twenty-eighth street north of Penn street, and the alley in the rear of the plaintiff's lots, to be brought to grade which required a cut of eighteen feet. To recover the damages for the injury thus caused to their lots, plaintiffs each brought separate actions against the defendant city but by agreement of all the parties the two actions were consolidated and tried as but a single action.

The defendant's answer was to the effect that the plaintiffs had in 1890 recovered said judgments against the defendant city for the injuries occasioned to their said lots by the grading of Penn street and that if they had used the amount recovered by that judgment, as contemplated by it, for the purpose of improving said lots, or in ameliorating their damaged condition, that no damage would have resulted from the grading of Twenty-eighth street and the alley. The court on motion of the plaintiffs struck this defense from the answer, and this action of the court, it is now contended, was error, for which we should reverse the plaintiff's judgment. It was optional with the plaintiffs whether or not they would expend the amount of damages recovered for the injuries occasioned to their lots by the grading of Penn street in improving and ameliorating the condition to which it had been reduced. If they elected to permit the lots to remain in the condition which the defendant's improvement of the street had left them, they had the undoubted right to do so, and it could in no event be of any concern to the defendant the one way or the other. This action can have no relation or connection with the former one. The two are separate and distinct, and neither is in any way dependent on the other. The damages recovered in this action are solely for the injuries occasioned to the plaintiff's

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lots by the grading of Twenty-eighth street and the alley.

The measure of damages to which plaintiffs were entitled to recover was the difference between the market value of the lots immediately before the injury took place and their value after the injury was completed. Martin v. Railway, 47 Mo. App. 452; Taylor v. Railway, 38 Mo. App. 668; Babb v. Curators, 40 Mo. App. 173; Slattery v. St. Louis, 120 Mo. 183; Sheehy v. Cable Co., 94 Mo. 574; Trust Co. v. Bambrick, 149 Mo. 560. The application of this rule requires the exclusion from consideration the injuries which resulted from the improvement of Penn street. It confines the inquiry to a narrow limit—to the ascertainment of the difference between the market value *immediately* before the injury occurred and that after it was complete.

If the market value of the lots by reason of the injury occasioned by the improvement of Penn street had been reduced to, say $2,500, and that was their value immediately before the injury to them occasioned by the improvement of Twenty-eighth street and the alley, then the measure of the plaintiff's damages would have been the difference between *this reduced value* and that when the injury was completed. The first made street improvement may have deprived the lots of half their value and the second may have further deprived them of the remaining half, so that the measure of damages to which plaintiffs were entitled to recover was the difference between the market value of the property after the occurrence of the first injury and immediately before that of the second and that after the completion of the latter. Accordingly, we do not think the court erred in striking out the part of the defendant's answer to which reference has been made. Nor do we think it erred in refusing to permit the defendant to inquire of the witnesses whether or not in their opinion if the plaintiffs had expended the amount recovered for the injuries occasioned by the grading of Penn street in the lowering of the surface of their lots and improving them that the grading of Twenty-eighth street and the

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alley would have injured their said lots. The pertinent question was, what was the *actual* market value immediately before the injury and not what it *might have been* had certain conditions existed. The latter is too speculative and theoretical and is not that contemplated by the rule for the ascertainment of damages in a case like this.

The defendant objects that a number of witnesses who testified their opinion as to the value of the plaintiff's lots were not sufficiently qualified to so testify. These witnesses were all residents of the city and testified that they were acquainted with the lots and knew their value. This was all that was required to qualify them to testify as experts. It was not necessary for them to be engaged in the real estate business. The value of such opinions depends upon the intelligence of the witnesses and the knowledge and experience which they possess in such matters, and in all cases it is a question for the jury. Union Elevator Co. v. Railway, 135 Mo. 353; Thomas v. Mallinckrodt, 43 Mo. 58.

The defendant further objects that the court erred in admitting in evidence certain photographs of the *locus in quo* after the injury complained of was complete. They were proven by the testimony *aliunde* to be true photographic prints and were therefore admissible in evidence for what they were worth. Baustian v. Young, 152 Mo. 317, and authorities there cited.

The defendant complains of the remark of the court made in the presence of the jury to the effect that "the question is what the lots were worth immediately before the grading was done and immediately after. Penn street is just the same as if a ravine was there." This remark was called out by an offer of the defendant "to prove the difference about Penn street being graded or not graded as to what effect it has on the property." It is rather difficult to understand from the language just quoted and in which defendant's offer was couched, exactly what it embraced, but the court evidently understood from it that the defendant was seeking to sustain the theory of the defense of its an-

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swer which had been stricken out. Whether or not the bank in front of plaintiff's lots on Penn street was natural or was caused by the grade of that street was not a fact material to consider in determining the *quantum* of damages that should be awarded for the injuries done to the lots by grading Twenty-eighth street; and, therefore, we can not see that the remark of the court was improper or if so that it was harmful to defendant.

The defendant objects that the court erred in not permitting it to inquire of a witness whether or not plaintiffs' improvements were made on their lots before the establishment of the grade. It is unnecessary to discuss this objection because it appears from other unobjected-to evidence that the grade was established in 1890 and the plaintiffs' improvements were placed on their lots the preceding year, so that the action of the court was not erroneous; or, if so, it did not hurt defendant.

The rule declared in the plaintiffs' second instruction which is in effect conceded to be a correct expression of the law applicable to the case, was preceded by a sort of prelude or preface which in substance told the jury that under the Constitution and laws of this State no private property could be lawfully taken or damaged for public use without just compensation, etc. And to this part of the instruction defendant objects as being erroneous. Certainly this was but an abstraction which announced no more than an axiomatic proposition in our law, and while the practice of giving instructions of that kind is not to be commended, but rather condemned, still, as it is obvious that the giving of that in the present case was not prejudicial to defendant in any way, it results that the action of the court affords no ground for serious complaint.

Nor do we think the plaintiffs' third instruction subject to the objection defendant has lodged against it. The facts embraced within its hypotheses were constitutive of the plaintiffs' case and within the limits of

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the issues made by the pleadings, and, hence, it was not an improper expression of the law.

The defendant further insists that the court erred in refusing its instruction A, but as the rule there declared, in respect to special damages as distinguished from those which were general in the locality, was fully and clearly embraced in the enunciation of other instructions (2, 3, and 4) given for it, there was no impropriety in refusing it.

In view of all the evidence before us we can not think the amount of damages found by the jury was excessive or that there is any just ground of complaint on that account. Several other exceptions taken to the action of the court during the progress of the trial have been called to our attention in the brief of defendant's counsel, but it is sufficient to say that an examination of them has not led us to the conclusion that the action of the court, in respect thereto, was erroneous.

The judgment will accordingly be affirmed. All concur.

BESSIE RAWLINGS, by Next Friend, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Passenger Carriers**: DAMAGES: PHYSICAL AND MENTAL SUFFERING. Pain of mind must be connected with bodily injury to be the subject of damages, unless the injury is accompanied by circumstances of malice, insult or inhumanity.

2. ———: CARRYING BEYOND DESTINATION: CONFLICTING EVIDENCE: EXCESSIVE FINDING. Where the evidence is conflicting as to an injury received by a person carried beyond his station and also in regard to the proximate cause of such injury, the verdict of the jury is conclusive, and in this case an assessment of one hundred and twenty-five dollars is not excessive.

Appeal from Boone Circuit Court.—*Hon. John A. Hockaday*, Judge.

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AFFIRMED.

Geo. S. Grover for appellant.

(1) Neither the effect upon the plaintiff's health, nor her mental anxiety, if any, are proper elements of damage under the pleadings and the evidence in this case, or in actions of this character. (a) Because they are too remote. Trigg v. Railroad, 74 Mo. 147; Marshall v. Railroad, 78 Mo. 610; Connell v. Telegraph Co., 116 Mo. 34; Francis v. Transfer Co., 5 Mo. App. 7; Strange v. Railway, 61 Mo. App. 586; Deming v. Railway, 80 Mo. App. 152; Snyder v Railway, 85 Mo. App. 495. (b) Because there is no causal connection between the act complained of and such effect. Henry v. Railroad, 76 Mo. 288; Sira v. Railroad, 115 Mo. 127. (2) For a mere technical breach of the contract of carriage, such as were here shown, the recovery should have been limited to nominal damages. Brown v. Emerson, 18 Mo. 103; Owen v. O'Reilly, 20 Mo. 603; Rogan v. Railway, 51 Mo. App. 665.

C. B. Sebastian for respondent.

(1) The question whether there was a personal injury or not, and whether or not said injury was a proximate consequence of the wrong committed by defendant, were questions of fact and the finding of the trial court is fully sustained by the evidence. (2) Even if there was a conflict, the trial judge saw the witnesses and heard the evidence, and could better weigh it. His finding is fully warranted and is in harmony with the finding in the cases of Evans v. Railway, 11 Mo. App. 463; Winkler v. Railway, 21 Mo. App. 99; Atkinson v. Railway, 90 Mo. App. 497.

SMITH, P. J.—The plaintiff in this case is the twelve-year-old sister referred to in the opinion in that of Noble Rawlings by Next Friend, etc. v. Wabash Railroad Company, decided at the present term. The

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statement of facts in that case will to a certain extent answer in this.

The plaintiff in this case, it appears, after leaving defendant's train and in her efforts to reach the station which it had carried her by, fell between the triangular bars or slats of the cattle guard which she was compelled to cross and in consequence thereof received several abrasions of the skin on her legs and a bruise on her thigh; and besides this, she fell down once or twice at other places and by the time she reached the station she was wet from head to feet and in a sorry plight generally. By that time it was getting so dark that her mother, who was looking for her and her little brother who was accompanying her, could not discern their moving forms but a short distance in the gloom and darkness. The plaintiff was made sore and sick, and was somewhat disabled to attend school for some time thereafter, as she had previously done.

She had been furnished by her father with a ticket over defendant's railway to More's station, and consequently the question whether or not she was a passenger does not arise in the case.

The defendant having sold the plaintiff a ticket to carry her to More's station, it can not excuse itself from a non-compliance with its undertaking by showing its train conductor was not aware of her presence on the train. Defendant knew, or ought to have known, when plaintiff entered a car of its train that she had a ticket which required it to stop its train at More's station so as to afford her an opportunity to leave it—the train—there. It was a clear breach of duty on defendant's part when it neglected to stop at the station of plaintiff's destination, and if injury resulted to plaintiff from such negligence there was liability to her therefor.

The defendant argues that the plaintiff in no event is entitled to recover more than nominal damages, but this we are unwilling to concede. The general rule announced and prevailing in this State is that pain of

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mind—injured feelings—when connected with bodily injury is the subject of damages, but must be connected in order to be included in the estimate unless the injury is accompanied by circumstances of malice, insult or inhumanity. Snyder v. Railway, 85 Mo. App. 495, and cases there cited.

In the present case it does not seem that the injury was accompanied with circumstances of malice, insult or inhumanity, but it can not be said that there was no evidence that the plaintiff's injured feelings were connected with bodily injury. It is true, there was a conflict in the evidence but this made it a case for the jury, or for the court sitting as a jury. And whether or not the negligence of the defendant already stated was the proximate cause of the injury was likewise a question for the jury. Evans v. Railway, 11 Mo. App. 463; Winkler v. Railway, 21 Mo. App. 99; Burke v. Railway, 51 Mo. App. 491.

The court sitting as a jury awarded to plaintiff damages to the amount of one hundred and twenty-five dollars, and this, in view of the evidence, was by no means excessive. There were no instructions asked or given except that of defendant in the nature of a demurrer to the evidence, which it seems to us was properly refused. No error is discovered in the action of the court and its judgment will accordingly be affirmed. All concur.

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NOBLE RAWLINGS, by Next Friend, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Passenger Carriers:** WHO IS PASSENGER: FARE: LIABILITY. Taking a place in the carrier's conveyance with the intention of being carried, creates an implied agreement to pay fare, and at once there springs up the reciprocal duty and responsibility of carrier and passenger.

2. ———: CARRYING BY STATION: DAMAGES: SICKNESS. A person carried by his station may recover for inconvenience, loss of time and labor, and necessary expense, but not for anxiety of mind nor effect upon health, such as sickness.

Appeal from Boone Circuit Court.—*Hon. John A. Hockaday,* Judge.

REVERSED.

Geo. S. Grover for appellant.

(1) The relation of carrier to passenger was never created, and therefore never existed, between the plaintiff and defendant. For that reason the plaintiff was not entitled to recover. Berry v. Railroad, 124 Mo. 247; 1 Fetter on Carriers of Passengers, sec. 210, p. 552, and cases cited. (2) The recovery permitted in this case, on account of subsequent sickness, was a prejudicial error, as there was no physical injury, and no malice, insult or inhumanity shown. Strange v. Railway, 61 Mo. App. 586; Deming v. Railway, 80 Mo. App. 152; Snyder v. Railway, 85 Mo. App. 495.

C. B. Sebastian for respondent.

(1) Appellant sought and obtained a special finding by the trial court on both of the points. That finding was against the contention, and no exception was made. Under the rule laid down by this court in the

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case of Freeman v. Hemenway, 75 Mo. App. 621, and by the Supreme Court in the case of Cochran v. Thomas, 131 Mo. 267, that finding is conclusive. (2) That plaintiff was a passenger is fully sustained by the evidence. Under the facts the finding of the trial court is fully sustained by the following cases: Cross v. Railway, 56 Mo. App. 665; Barth v. Railway, 142 Mo. 549. (3) The finding of the trial court, that plaintiff is entitled to recover for subsequent sickness occasioned by his being carried by said station, and the judgment for $25, is fully sustained by the evidence. The court following the rule of this court in the case of Spry v. Railway, 73 Mo. App. 203.

BROADDUS, J.—This suit was brought in the court of a justice of the peace, appealed to the circuit court where plaintiff obtained judgment from which defendant appealed here.

The evidence showed that the plaintiff, a boy about four years of age, with his sister, about twelve years old, was put upon defendant's train by his father at Columbia, Missouri, to go to More's station about one mile distant. The sister had a full fare ticket but plaintiff had none. The train was behind time and Bessie, plaintiff's said sister, testified that just before she got to More's station she gave the conductor her ticket. The train passed the station to a point about 250 yards when it was stopped and plaintiff put off without being injured. Bessie retraced her steps with the plaintiff to the station, passing over the cattle guards. She describes the route as muddy and slippery. It was late in the evening when they got back to the station where they met their mother who, in her testimony, says it was so dark she could not recognize them at a short distance. She states that when the plaintiff got home he was wet; that he had fallen down in the mud, was very muddy, and was "almost scared to death;" and that they had to go to the doctor and get some medicine for him, and that by eight o'clock that night he was in bed with a high fever.

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The court, sitting as a jury, made a finding of facts, among which were; that plaintiff did not receive any physical injury by reason of being carried by said station at said time and place, except subsequent illness; that he was not entitled to recover for fright occasioned thereby, but that he was entitled to recover for sickness which was brought about by reason of his being carried by said station. The court further found that the act of defendant's servants in putting plaintiff off the train was not characterized by malice, insult or inhumanity.

The defendant insists that plaintiff was not entitled to recover for two reasons, viz.: first, because the relation of carrier and passenger did not exist; second, because plaintiff was allowed to recover on account of subsequent sickness, whereas it was shown that no aggravating circumstances attended the act of the defendant's servant in putting him off the train.

Fetter, in his definition of passenger (Fetter on Carriers of Passengers, sec. 210) states: "It is not easy to construct a definition of the term 'passenger' which, on the one hand, will accurately include all persons entitled to the rights of passengers, and, on the other, exclude all those who are not. . . . In the great majority of cases, there can be no question on this score, because a person riding in a passenger coach who has prepaid his fare is necessarily a passenger." A much better idea of the term is gained from its definition in Railway v. Price, 96 Pa. St. 256, viz.: "In its legal sense a passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as equivalent therefor." In section 221 of Fetter, supra, it is said: "The purchase of a ticket or the prepayment of fare is not necessary to constitute the relation of passenger and carrier." In Railway v. Huggins, 89 Ga. 494, the court adopted the following definition from Hutchinson on Carriers: "It is universally agreed that the payment of the fare or the price of the carriage is not necessary to give rise to the liability. The carrier may demand his payment if he chooses to do so, but if

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he permits the passenger to take his seat or enter his vehicle without such requirement, the obligation to pay will stand for actual payment for the purpose of giving effect to the contract with all its obligations and duties. Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts upon him a liability to the carrier, from which at once springs the reciprocal duty and responsibility." See, also, Railway v. Hirst, 30 Fla. l. c. 40; Railway v. Groseclose's Admr., 88 Va. 267. "If the passenger is lawfully on the cars, the company is bound to carry him safely, whether he has paid his fare or not, but if he refuses to pay on demand the company may eject him from the train." Railway v. Muhling, 30 Ill. 9. "A person getting on a train for the honest purpose of securing passage thereon constitutes him a passenger." Cross v. Railroad, 56 Mo. App. l. c. 674.

In view of all the authorities referred to, and we find none to the contrary, it is evident that the plaintiff was within the meaning of the law a passenger on defendant's train at the time in question. He was put upon the train by his father with his sister for whom he purchased a ticket for the purpose of securing a ride to More's station where his journey was to terminate. In view of the general custom of railroad carriers to permit small children like the plaintiff to ride on their cars free of charge when accompanied by some older person who pays fare, it is reasonable to presume that plaintiff was a passenger in good faith, especially so as no objection was made to him as a passenger for want of prepayment of such fare, and no demand and refusal to make such payment was shown. This entering the car under the circumstances constituted him a passenger with all the rights as such.

The question is raised, was the plaintiff entitled to recover for subsequent sickness caused by his being put off at the point 250 yards beyond the station? It will be observed that the court eliminated from its findings

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every element of damages, such as fright, and gave damage alone for subsequent sickness.

In Trigg v. Railway, 74 Mo. 147, it was held that a female passenger who was carried beyond her station by the negligence of the company, but without any circumstances of aggravation and without receiving any personal injury "may recover compensation for the inconvenience, loss of time, labor and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off." The same rule was applied in Strange v. Railway, 61 Mo. App. 587, Deming v. Railway, 80 Mo. App. 152, and in Snyder v. Railway, 85 Mo. App. 495. But we are cited to the case of Spry v. Railway, 73 Mo. App. 203, as holding differently. Our examination of that case satisfies us that it comes within the foregoing rule. The facts were that a woman—plaintiff in the case—was requested by defendant "to leave its passenger train about a half mile from the union depot in the city of Sedalia and far from any depot or shelter, and the servants of defendant when requiring plaintiff to leave its car failed to give her any directions as to where she should go for shelter from the violence of a rain storm (then prevailing). She being unacquainted in the vicinity, whereby she was compelled in the midst of such storm to walk to said union depot, and in consequence of such exposure" she became sick. She was allowed to recover on the ground that the act of defendant's servants in requiring her to leave the train amidst a rain storm in the night without directing her where to go, was an act of inhumanity. On this question the authorities seem to be uniform.

It follows, therefore, that the action of the court in allowing plaintiff damages, under the circumstances of the case, for subsequent sickness was error, for which the cause is reversed. All concur.

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BART AKERS, Appellant, v. W. H. KOLKMEYER & COMPANY, Respondents.

Kansas City Court of Appeals, January 5, 1903.

1. **Third Class Cities:** PUBLIC SEWER: ORDINANCE: USER. A city by resolution (not an ordinance) established a public sewer and borrowed money and paid for the construction of same, and accepted and used same as a public sewer. *Held*, these acts, made it a public sewer as if it had been originally established by ordinance.

2. ———: ———: ———: ———. *Held*, likewise, if accepted and used by the city it would become a public sewer though built by private contributions.

3. ———: ———: ———: ———: RATIFICATION: ESTOPPEL. While a subsequent ratification in proper form of such a sewer might estop the city, yet it could not estop a private citizen, and in a controversy between such citizen and others as to whether it were a public sewer, such ratification need not be pleaded, but may be shown in evidence to establish the fact that it was a public sewer.

4. **Offices and Officers:** CITY ENGINEER: DE FACTO. Though a city engineer be informally inducted into office, yet if he is recognized as such and discharges the duties of the office, he becomes a *de facto* officer and his acts are valid so far as they concern the public and the rights of third persons who have an interest in the things done.

5. **Third Class Cities:** DIMENSIONS AND MATERIAL OF SEWER: SPECIFICATIONS. A city by ordinance adopted a general sewer system with maps, profiles, plans and specifications then on file. By another ordinance it provided that all sewer work should be done in accordance with such plans and specifications. It then established a sewer district and ordered the construction of a sewer therein. *Held*, the dimensions and material for the district were sufficiently indicated by the plans and specifications of the general ordinance.

6. ———: SEWER DISTRICT: NECESSITY OF. When a city council has power to create a sewer district and issue taxbills therefor, its acts in so doing are, in the absence of fraud, conclusive upon the courts on all questions relating to the necessity and sanitary propriety of such sewer.

7. ———: SEWER TAXBILLS: ENGINEER'S REPORT: FILING. The report of an engineer under review is *held*, while lacking in form, to be substantially sufficient to authorize special assessments, and is found to have been filed in fact though not so marked, which omission can not affect its validity.

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Appeal from Boone Circuit Court.—*Hon. John A. Hockaday,* Judge.

AFFIRMED.

STATEMENT BY BROADDUS, J.

This is a suit in equity to have declared as void a certain taxbill, and to remove the cloud upon plaintiff's title to lots 271, 272 and 273 in Columbia. The bill, or petition, alleged that the city of Columbia is a city of the third class, that defendants Kolkmeyer are partners engaged in the business of contracting, that plaintiff is the owner of said lots, that the city council of said city passed an ordinance establishing sewer district No. 4 and let a contract to defendants Kolkmeyer for the construction of a district sewer therein; that afterwards the city council passed an ordinance directing the mayor and city clerk to issue a taxbill for $161.75 against said real estate; that said taxbill was so issued, delivered to the defendants Kolkmeyer and assigned by them to the defendant bank, as collateral security. The petition also alleged that said taxbill is void for five reasons; first, that while the city council attempted to establish a public sewer, yet no ordinance establishing a public sewer was ever passed; second, that the district sewer did not connect with any public or other district sewer in said city, nor with the natural course of drainage; third, that the city engineer did not compute the whole cost of said district sewer, and did not apportion the same against the lots and pieces of ground, and did not report the same, by bill or otherwise, to the city council; fourth, that the ordinance establishing said district sewer did not state the size, dimensions nor materials out of which the same was to be constructed; fifth, that there was no petition for said district sewer, and no necessity for the same, for sanitary purposes or otherwise, and that the actions of said city council were unreasonable and oppressive, as there are no water pipes near said district sewer.

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The answer of defendant admitted the construction of the sewer and the issuance of the taxbills, and denied all the other allegations of the petition.

The evidence disclosed that in May, 1900, the city council of Columbia submitted a proposition to the qualified voters of said city to incur an indebtedness of $18,500 for the purpose of establishing a system of main public sewers for said city, which was carried and bonds were issued and sold and the proceeds covered into the city treasury. In June of that year the city entered into a contract with one Hiram Phillips to plan and lay out a proposed public and district sewer system; whereupon said Phillips prepared and submitted to the city council certain surveys, maps, profiles, plans and specifications and details for the construction of a public and district sewer system, which was accepted by resolution of the city council on July 17, 1900. In August, 1900, a contract was let under which the main public sewers were constructed in accordance with the plans and surveys made by said Phillips. On March 12, 1901, the main public sewers were formally accepted by the council and were paid for out of the money in the city treasury. In the meantime the council had passed an ordinance on the subject of sewers which provided that the work in their construction should be in compliance with said plans and specifications; and in May, 1901, the city council by ordinance adopted the said maps, plans, etc., made by Phillips showing in detail the location, connections and dimensions of the main and district sewers and described the materials to be used in their construction. At this time the city council established sewer district number four. On May 21, 1901, the council passed an ordinance which declared that: "The sanitary condition within districts Nos. 1, 2, 3, 4 is such as to require the immediate construction of sewerage in said districts, providing for the route, material and manner of constructing the sewers in the respective districts."

It is admitted that the district sewer in question was established by ordinance.

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While the work was in progress on said sewer the city engineer, on account of ill health, became unable to perform the active duties of his office, in consequence of which one E. B. Cauthorn was employed as special engineer for the sewer work. And on October 31, 1901, the regular city engineer's resignation was accepted and Cauthorn was at once appointed in his place and assumed and discharged the duties of the office without having given his official bond and taking the oath of office as such. On November 8, 1901, having computed the cost of the sewer and apportioned it against the several lots, he made and filed his report although it was not marked as filed at that time.

The plaintiff offered to prove that there was no necessity for said district sewer for sanitary purposes; that the health in that part of the city was good, and that there were no water pipes or connections within three blocks of said district sewer, which the court excluded. On the hearing, the court dismissed plaintiff's bill and he appealed.

N. T. Gentry for appellant.

(1) The law has long been settled in this State, that proceedings by municipal corporations to compel the owners of land abutting on a street or alley to pay for improvements in front of their property are *in invitum,* and a strict performance of all the conditions imposed is necessary, in order to fasten a charge or lien on the property of the citizen. Guinotte v. Egelhoff, 64 Mo. App. 366; Fruin v. Geist, 37 Mo. App. 512; Leach v. Cargill, 60 Mo. 316; Kiley v. Oppenheimer, 55 Mo. 374; Westport ex rel. v. Mastin, 62 Mo. App. 654; West v. Porter, 89 Mo. App. 153; Knapp v. Kansas City, 48 Mo. App. 492; St. Louis v. Telephone Co., 96 Mo. 628; Joplin v. Luckie, 78 Mo. App. 13; Dillon on Munic. Corp. secs. 89, 90 and 91; Forry v. Ridge, 56 Mo. App. 620. (2) No public sewer was ever established in Columbia, because no ordinance establishing such sewer was ever passed by the city council nor approved by the mayor.

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Sec. 5847, R. S. 1899; Kolkmeyer v. Jefferson City, 75 Mo. App. 683; Heidelberg v. St. Francois Co., 100 Mo. 74; McKissick v. Mt. Pleasant Tp., 48 Mo. App. 416; Crutchfield v. Warrensburg, 30 Mo. App. 456; Thrush v. Cameron, 21 Mo. App. 394; Cape Girardeau v. Fongen, 30 Mo. App. 551; Poplar Bluff v. Hoag, 62 Mo. App. 675; Nevada v. Eddy, 123 Mo. 558; Trenton v. Coyle, 107 Mo. 193; Irvine v. Devors, 65 Mo. 625. (3) And our Supreme Court held that a city is not liable to a property-owner for the change of grade in one of its streets, unless said grade was ordered changed by an ordinance, duly passed, and this, too, when the city council appointed a committee to superintend the work, and the work thus done by its committee, was accepted by the council and paid for. Thompson v. Boonville, 61 Mo. 282; Gehling v. St. Joseph, 49 Mo. App. 430; Beatty v. St. Joseph, 57 Mo. App. 251; Werth v. Springfield, 78 Mo. 107; Rowland v. Gallatin, 75 Mo. 134; Stewart v. Clinton, 79 Mo. 609; Kolkmeyer v. Jefferson City, 75 Mo. App. 682; Rives v. Columbia, 80 Mo. App. 176; Reid v. Peck, 163 Mo. 338; Koeppen v. Sedalia, 89 Mo. App. 648; Steubuer v. St. Joseph, 81 Mo. App. 273; Johnson v. School District, 67 Mo. 319; Cheeney v. Brookfield, 60 Mo. 53; State v. Treasurer, 22 Ohio St. 144; People v. Peters, 4 Neb. 254; Taylor v. Wayne, 25 Iowa 447; Clark v. School Directors, 78 Ill. 474; Bayha v. Taylor, 36 Mo. App. 437; Heman v. Payne, 27 Mo. App. 481. (4) The only way that a city can ratify an unauthorized act of its officers is by an ordinance, duly passed and approved. Eichenlaub v. St. Joseph, 113 Mo. 395; Tiedem. on Munic. Corp., sec. 170; State ex rel. v. Milling Co., 156 Mo. 634; Unionville v. Martin, (not yet reported). (5) No ratification pleaded in answer. Mize v. Glenn, 38 Mo. App. 104; Hudson v. Railway, 101 Mo. 29; Bliss on Code Plead., sec. 352; Ferneau v. Whitford, 39 Mo. App. 316; Webb v. Allington, 27 Mo. App. 571; Bank v. Armstrong, 62 Mo. 59; Noble v. Blount, 77 Mo. 235; Kirby v. Railway, 85 Mo. App. 350; Bank v. Westlake, 21 Mo. App. 572; Nichols v. Larkin, 79 Mo. 264; A. & M. Ass'n v. Delano, 108

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Mo. 221; Musser v. Adler, 86 Mo. 449. (6) District must connect with public sewer. Kansas City ex rel. v. Ratekin, 30 Mo. App. 416; Bayha v. Taylor, 36 Mo. App. 427; Kansas City ex rel. v. Swope, 79 Mo. 446; St. Joseph ex rel. v. Wilshire, 47 Mo. App. 125; Heman v. Payne, 27 Mo. App. 481. (7) Necessity of engineer's report. R. S. 1899, sec. 5848; R. S. 1889, sec. 1542; Marshall ex rel. v. Rainey, 78 Mo. App. 421; Mills v. Detroit, 95 Mich. 423; Erie v. Brady, 150 Pa. St. 462; s. c. 24 Atl. Rep. 641; Merritt v. Porchester, 71 N. Y. 309; Erie v. Brady, supra. (8) Was Mr. Cauthorn city engineer? Section 159 of the city's Revised Ordinances for 1900. (9) The ordinance establishing the district sewer does not state the size, dimensions nor materials out of which said sewer is to be constructed; this is a fatal omission. St. Joseph ex rel. v. Wilshire, 47 Mo. App. 125; St. Louis v. Clemens, 43 Mo. 395; Gilbreath v. Newton, 30 Mo. App. 392; Dun v. McNealy, 75 Mo. App. 220; Manfg. Co. v. Hamilton, 51 Mo. App. 135; Cole v. Skrainka, 105 Mo. 308; 2 Dillon on Mun. Corp. (4 Ed.), sec. 811; Oster v. Jefferson City, 57 Mo. App. 493.

E. W. Hinton, Gillespy & Conley and *W. S. Pope* for respondents.

(1) When the city accepted the main sewer and paid for its construction with public funds regularly appropriated by ordinance for that purpose, it thereby recognized and established it as a main public sewer, and that, too, by ordinance. Foncannon v. Kirksville, 88 Mo. App. 279; Devers v. Howard, 88 Mo. App. 253; Dooley v. Kansas City, 82 Mo. 444; State ex rel. v. Mill. Co., 156 Mo. 620; City v. Armstrong, 56 Mo. 298. (2) But it has never been thought necessary to show a formal establishment of a street by ordinance in the first instance in order to charge the municipality with the duty of maintaining it in proper condition as a public street. Golden v. Clinton, 54 Mo. App. 100; Baldwin v. Springfield, 141 Mo. 205; City v. Ratekin, 30 Mo. App.

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428; Hill v. Drug Co., 140 Mo. 433; Hackett v. Ins. Co., 79 Mo. App. 16; Werth v. Springfield, 78 Mo. 107; Iron Co. v. St. Louis, 138 Mo. 608. (3) Mr. Cauthorn accepted the appointment and assumed the duties of the office. This constituted him a *de facto* officer, and his acts as such were as valid and binding in collateral proceedings as though he had properly qualified by giving bond and taking the prescribed oath of office. State v. Dierberger, 90 Mo. 369; State ex rel. v. Badger, 90 Mo. App. 183. (4) Under the general rule as to the presumption of regularity attending official acts, as well as the express statute on the subject, the issuance of the taxbill raises the presumption that the city engineer properly computed the costs of the sewer and apportioned the same against the several lots, and that this was duly reported to the council. City of Marshall v. Rainey, 78 Mo. App. 216; State ex rel. v. Seahorn, 139 Mo. 582. (5) By the ordinance establishing this sewer its dimensions are fixed at eight inches. By the general ordinance passed long before this time it was provided that all sewer work should be done in accordance with the plans and specifications on file in the office of the city clerk. And by the ordinance of May 9, 1901, passed prior to the establishment of this district sewer, the Phillips map, profiles, plans and specifications, which were then on file in the office of the city clerk, were formally adopted as the basis of the general sewer system. Finally, the subsequent ordinance of May 21, establishing this district sewer, provided for its construction in accordance with the specifications for the main sewer. This was all that is necessary. Galbreath v. Newton, 30 Mo. App. 380; St. Joseph v. Landis, 54 Mo. App. 315; Roth v. Hax, 68 Mo. App. 283; Becker v. Washington, 94 Mo. 375. (6) The necessity for the establishment of this sewer on sanitary grounds was a question solely for determination by the city council, and in the absence of a charge of fraud or corrupt abuse of this power, made in a direct proceeding to annul the ordinances establishing the sewer district and providing for the construction of sewers therein, the action of the

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city council in this respect is conclusive upon the courts. Heman v. Schulte, 166 Mo. 409.

BROADDUS, J.—The plaintiff's contention in part is, that the defendant city council by its ordinance, in building the sewer in question, failed to connect it with a main public sewer. That is to say, it was not connected with a main public sewer established according to law. There is no dispute but what it was connected with a main sewer, but the objection is that such sewer was not established by ordinance and was not therefore a main public sewer. It has been shown that such sewer was built in pursuance of a resolution of the city council and paid for out of the money in the city treasury provided for that purpose by a vote of the people of said city. It is true that said sewer should have been provided for by ordinance, but the act of the city council, after it was so constructed, in accepting and paying for the same by funds secured for that purpose, constituted it, in law, as much a public sewer as if it had been originally established by ordinance. Foncannon v. Kirksville, 88 Mo. App. 279; Devers v. Howard, 88 Mo. App. 253; Dooley v. Kansas City, 82 Mo. 444; State ex rel. v. Mill Co., 156 Mo. 620; City v. Armstrong, 56 Mo. 298.

But we can not see what difference it would make whether such so-called public sewer was established by ordinance or not, if prior to the establishment of the district sewer in controversy, it existed as such. For instance, if it had been constructed as the result of private contributions, and turned over to the city for public use and so accepted, it would have been to all intents and purposes a public sewer. We hold that it was not a matter properly in issue, if it existed as a public sewer, no matter how constructed.

But plaintiff says that the ratification of the unauthorized acts of the city officers in erecting said sewer was not pleaded as an estoppel, therefore it could not avail defendant. But was the ratification in question a matter of estoppel in the sense as used by the appel-

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lant? It is true, the city by such ratification would be precluded from denying that it had waived the necessary requirements for the establishment of said sewer; but it was not an estoppel as such to the plaintiff. The evidence of such fact was not introduced to show that plaintiff was estopped from denying that said sewer was a public sewer, but as affirmative proof that such sewer was lawful by reason of such subsequent ratification, as much so as if the act had been consummated by ordinance in the first place. In other words, that the sewer was a lawful sewer, which the plaintiff had undertaken to show it was not. It was not the act of plaintiff that was invoked to defeat him, but the act of the legislative council of the defendant which went to establish an important fact in the case. The issue tendered by the plaintiff was that the sewer in question was not a lawful sewer established by ordinance; this, the defendant's answer denied, and proof was admitted without objection, on the ground that it was not competent because not pleaded as an estoppel, and it is too late to raise the question for the first time in this court. Besides, it has been held, under an allegation that a city had made a certain contract, that it was competent to prove that the city had ratified such contract made by its officers without previous authority. Iron Co. v. St. Louis, 138 Mo. 608; Devers v. Howard, 88 Mo. App. 254. If such be true, the converse is also true, wherein the answer denies that the act was unlawful for want of an ordinance and authorizes in support of such denial, proof of some ordinance.

It is also contended that E. B. Cauthorn, who had charge as city engineer of the work on the sewer, was not city engineer because he did not take the oath of office and give bond as such, consequently his report upon which the validity of the proceedings to charge plaintiff upon the special taxbill is sought to be sustained has no legal force whatever. It is true that if he was not lawfully city engineer the taxbill fails because of want of authority in said engineer. But as it appears that said Cauthorn assumed and performed

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the duties of the office, he therefore became *de facto* city engineer and his acts are to be treated as if he was *de jure* such officer. It is well settled that the acts of a *de facto* officer "are valid so far as they concern the public, or rights of third persons who have an interest in things done." State v. Dierberger, 90 Mo. 369; State ex rel. v. Badger, 90 Mo. App. 183. This question has been too well settled to justify further comment.

Another contention of the appellant is, that the city council failed to designate by ordinance the size and dimensions of the district sewer in controversy and the material for its construction. The ordinance establishing said sewer fixes its dimensions at eight inches. Prior, however, as the evidence shows, the city by ordinance adopted for its general sewer system the maps, profiles, plans and specifications made by Phillips and then on file, though not marked filed, in the office of the city clerk. And prior to that time the city council had by general ordinance provided that all sewer work should be done in accordance with such plans and specifications. We think these ordinances were sufficient authority for the manner in which and the material with which said sewer was to be constructed. The fact that the Phillips maps, plans, etc., were not marked filed, as the plaintiff thinks they ought to have been to give them validity, can make no difference, as such marking only went to the question of identification. It was sufficient if they were filed and identified, which was not disputed. The ordinance providing for the construction of the sewer in question in accordance with the provisions for the main sewer, was legitimate. Becker v. Washington, 94 Mo. 375; Roth v. Hax, 68 Mo. App. 283.

The necessity for the construction of the sewer was also raised by the appellant upon his offer to prove that the health of the inhabitants in the district was good, etc. This question was passed upon in Heman v. Schulte, 166 Mo. 409, in which it was held:

"When a municipal assembly is vested with the power to pass an ordinance for the construction of a

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sewer, and the creation of a sewer district, and the issuing of special tax assessments on the sewer property within the district, to pay for the same, its acts under that power, in the absence of fraud, are conclusive upon the courts, whether the attack made thereon be collateral or direct." There was no offer to prove that the council in this case acted either fraudulently or corruptly.

The plaintiff made objections to the sufficiency of the said engineer's report. While it may be somewhat lacking in form and clearness of detail, substantially, it contained sufficient data authorizing the special assessment in question. And the fact that the city clerk did not mark it filed at the time it was filed with him can make no difference. The omission would not have the effect of destroying its validity. Many other objections are made to it which we do not deem of sufficient importance to consider.

Finding no error in the action of the court dismissing plaintiff's bill, the cause is affirmed. All concur.

MARGARETTA BOULTON et al., Respondents, v. W. H. KOLKMEYER & COMPANY, Appellants.

Kansas City Court of Appeals, January 5, 1903.

1. **Contracts:** SEWER BUILDING: CONSTRUCTION: TIME OF PERFORMANCE: RATIFICATION. The contract for the construction of a sewer was awarded June 24 and executed on July 20 thereafter. Work began on August 8. On September 9 the city council formally ratified everything done in pursuance of the contract, as of the date of the award. *Held*, the council had power to ratify the contract but not to change its terms, and if the ordinance is to be construed as ratifying what was done under the contract, the time for performance should be computed from the date of commencing work, and an excess of four days is not unreasonable and can make no difference.

2. ———: ———: ———: ———: ———. *Held*, further, that if the contract did not go into effect until the ratification, the work was completed within the contract period.

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Appeal from Boone Circuit Court.—*Hon. John A. Hockaday,* Judge.

REVERSED AND REMANDED *(with directions).*

E. W. Hinton, Gillespy & Conley and *W. S. Pope* for appellants.

(1) The contention that the contractor failed to complete the work on time is based on an erroneous theory, as to when the time began to run. On September 9, 1901, the council for the first time by ordinance adopted this contract. The work under the contract was completed on November 1, within seventy working days after its approval by ordinance, but not within seventy days after its date. (2) The contract could not take effect on the date of its execution by the mayor and city clerk, because it had not been authorized by ordinance. Rumsey v. Schell City, 21 Mo. App. 175; Kolkmeyer v. Jefferson City, 75 Mo. App. 683. (3) And since the contract could not become binding on the city until ratified by ordinance, it necessarily follows that it could not, and did not take effect until the passage of the ordinance approving it, namely, September 9, 1901. (4) Where the ordinance authorizing the work fixes the limit for its completion, that time must govern and no stipulation to the contrary in the contract can save it. Although the ordinance may not fix a time limit, yet if the contract itself does fix such a limit, and time is of the essence of the contract, the usual penalty clause will not warrant any substantial delay beyond the limit. It has been equally well settled by the Supreme Court in Carlin v. Cavender, 56 Mo. 286, that where the ordinance fixes no time limit, then a reasonable delay beyond the time specified in the contract will not defeat the taxbill if time is not of the essence of the contract. These rules have been so clearly stated by this court in Ayers v. Schmohl, 86 Mo. App. 349, that further comment is unnecessary.

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N. T. Gentry for respondent.

(1) The failure of the contractors to complete the district sewer work within the seventy working days, required by their contract, vitiates the taxbills. McQuiddy v. Brannock, 70 Mo. App. 535; Whittemore v. Sills, 76 Mo. App. 248; Trust Co. v. James, 77 Mo. App. 616; Rose v. Trestrail, 62 Mo. App. 352; Schoenberg v. Heyer, 91 Mo. App. 389; Winfrey v. Linger, 89 Mo. App. 161; Springfield ex rel. v. Davis, 80 Mo. App. 574; Paving Co. v. Ridge, 68 S. W. 1043. (2) The work was not completed till more than ninety days thereafter; but on October 15, the city council passed an ordinance extending the time thirty days. This ordinance of extension was not passed till three days after the seventy days had expired. Under the repeated rulings of our courts, the city council could not give life to that which was already dead. Neill v. Gates, 152 Mo. 585; Beverage v. Livingston, 54 Cal. 54.

BROADDUS, J.—This case is like that of Akers v. Kolkmeyer, decided at this term of court, in so far as the legality of the proceedings are concerned leading up to and including the letting of the contract under which the sewer in this case was constructed, as well as the report of the city engineer upon which the taxbill in controversy was issued. The sole difference being, that in this case it is claimed that the defendant contractors did not complete the work within the time provided for in their contract with the city—time being of the essence of the contract.

On June 24, 1901, the contract for the construction of the sewer in this case was awarded to defendants Kolkmeyer. On the twentieth of July, next following, the contract was signed by the defendant contractors and the mayor and city clerk on behalf of the city; and on the ninth of September it was formally ratified by an ordinance of the city council. It was shown, however, that the work of constructing the sewer was begun on August 8 prior thereto, and was then in progress. On October 15, the council by ordinance extended the

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time for the completion of the work for thirty days, but it was completed and accepted November 1.

That part of the contract relating to the time in which the work was to be completed is as follows: "The time for the completion of this work shall be seventy working days from the time when the contract takes full force and effect. Should the contractor fail to complete the work to the acceptance of the engineer within the time specified, then there shall be withheld from the money paid to him on his final estimate a sum of money equal to $10 per day for each and every day of such delay as liquidated damages."

That part of the ordinance ratifying said contract that was reduced to writing and signed by defendant contractor and the mayor is as follows: "That all has been done or omitted to be done in awarding said contract to W. H. Kolkmeyer & Co. in said sewer district, and everything that has been done by said Kolkmeyer & Co. in pursuance of said contract is hereby ratified and confirmed as of date when said contract was awarded."

It is admitted that said ordinance is a complete confirmance of and imparts validity to said contract which up to said date had no binding force whatever for want of authority on the part of the mayor and city clerk to make the same. It is claimed that said ordinance has not only the effect of imparting validity to said writing but also that by fair construction it fixes the date for the beginning of work as of the date of the contract itself, which if true, defendant contractors were eighteen days in completing the work in excess of the seventy days fixed by the contract. We do not think it should be so construed.

While it was competent for the council to affirm said contract in all its parts, it was not competent for it to vary its terms in any respect so as to inject any additional obligations upon either the city or the contractors. By the terms of the said writing, the time for the completion of the work was seventy days from the time when the contract should take full force and effect. The

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contract did not take full force and effect until it was ratified on the part of the city council. The said ordinance would, however, as an independent proposition have the effect of ratifying what had been done under said unauthorized agreement. Devers v. Howard, 88 Mo. App. 261; State ex rel. v. Milling Co., 156 Mo. 634. It therefore follows, if said ordinance is to be construed as ratifying what had been done under the unauthorized acts of the city's agents, the defendant contractors' liability for the completion of the work would not begin prior to the day in fact on which the work began—the eighth day of August. In which case the contractors substantially complied with their contract. Four days in excess of the seventy working days made no difference as it was not shown that there had been any unreasonable delay or that plaintiff was injured thereby.

It is well-settled law that where there is no ordinance fixing the time within which a contract is to be completed, then time is not of the essence of the contract, unless the contract so provides. Carlin v. Cavender, 56 Mo. 286. The cases on this question were reviewed by Judge Ellison on this court in Ayers v. Schmohl, 86 Mo. App. 349, in which his opinion reads: "Those cases further held that where the ordinance did not fix a specific time and the contract did, that a failure to complete the work within the time stated in the contract did not necessarily avoid the bill, there being nothing to show that time was of the essence of the contract, or that the delay was unreasonable." But if the contract did not go into effect until ratified by the city council, to-wit, on the ninth of September, then the work was completed in forty-four days, which was within the time fixed by said contract. And we can see no good reason for holding otherwise.

For the reasons given the cause is reversed with directions to set aside the judgment of the court sustaining plaintiff's injunction and judgment entered dismissing the bill. All concur.

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EVA C. EGAN, Administratrix, etc., Respondent, v. THOMAS J. MARTIN et al., Appellants.

Kansas City Court of Appeals, January 5, 1903.

In an inquiry of damages for breach of a covenant for title, evidence showing the effect of a restriction on the power of disposal contained in plaintiff's deed is proper to be considered in measuring damages, and evidence of its effect on the value of the property is admissible.

Appeal from Chariton Circuit Court.—*Hon. W. S. Stockwell,* Special Judge.

REVERSED AND REMANDED.

W. W. Rucker and *Kinley & Kinley* for appellants.

(1) It is conceded that by the deed from defendants to James A. Egan, he got all of the interest in the real estate in question except what was vested in the Warren lodge, and in determining the value of the lodge's interest the limitations on its estate was a proper subject of inquiry, hence, the court committed error in refusing to permit such inquiry and in refusing defendants' instruction No. 2. Hill v. Golden, 16 B. Mon. 554; Terry v. Drabenstadt, 68 Pa. St. 400; Raivle Cov. Title (5 Ed.), par. 186; Guthrie v. Pugsley, 12 Johns. 126; Tanner v. Livingston, 12 Wend. 83; Lockwood v. Sturdevant, 6 Conn. 373; Mills v. Catlin, 22 Vt. 98; Walpin v. Woodruff, 11 Ohio 125; Hoot v. Spade, 20 Ind. 326; Hall v. Gale, 20 Wis. 292; Bibb v. Freeman, 59 Ala. 612; Weber v. Anderson, 73 Ill. 439; Wadham v. Jones, 4 Ill. App. 642; Cornell v. Jackson, 57 Mon. 506.

A. W. Mullins, O. F. Smith and *Harry K. West* for respondent.

(1) It was expressly decided in this case on the first appeal (Egan v. Martin, 71 Mo. App. 60), that plaintiff's instruction as to the measure of recovery should have been given. For refusal to give it the judgment was then reversed. The same instruction, word for word, was asked and given, on the last trial.

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It was always the law, and is certainly the law of this case. It is unnecessary to cite authorities to the effect that this question is now *res judicata*. Egan v. Martin, 71 Mo. App. 60; Egan v. Martin, 81 Mo. App. 676; Langenberg v. Dry Goods Co., 74 Mo. App. 12.

BROADDUS, J.—This case has been before this court on two former occasions and will be found reported in 71 Mo. App. 60, and 81 Mo. App. 676.

The action is for breach of warranty contained in a deed from defendants to James C. Egan. Since the case was last reported said Egan has died, the cause being revived in the name of the plaintiff herein as his administratrix. A statement of the principal facts of the case are set out in the opinion of Judge SMITH in 71 Mo. App. supra.

On the first appeal the cause was reversed for the reason that the court refused to give the following instruction in behalf of the plaintiff, viz.: "If the deed from the defendants to the plaintiff conveyed only the title to an undivided one-half of the ground described in said deed, then the plaintiff is entitled to recover in this case the reasonable value, not exceeding the purchase price of the said undivided half of said ground owned by said Warren lodge, with interest thereon at the rate of six per centum per annum from February 8, 1893."

On the second appeal the cause was reversed because the trial court found for the defendants on the ground that they had good title by adverse possession. This court holding that, upon the facts as shown by the record certain admissions were made by the defendants since the commencement of the suit precluded them from such defense.

On the last trial, now being reviewed, certain other questions were injected into the case that were not gone into on the two former trials. It is to the action of the court on these additional matters that the defendants claim that the court committed prejudicial error. The plaintiff, however, insists that all such questions were *res adjudicata*. But as they all relate to the measure

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of plaintiff's damage, it will be seen hereafter that plaintiff is in error in that respect.

For a complete understanding of the questions involved it is indispensable that a copy of the material parts of the deed from John Cunningham and wife to the Masonic lodge be inserted in this opinion, which is as follows:

"Witnesseth, that the said parties of the first part, for and in consideration of the sum of seven hundred dollars, to them in hand paid by the said parties of the second part, receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said parties of the second part and their regular successors forever, subject to the conditions and covenants hereinafter mentioned, the following described real estate, to-wit:

"The undivided one-half part of twenty feet fronting on Bridge street and running back the full depth of the lot on the east side of lot No. (1) one, in block No. (1) one, in Redding's addition to the town of Keytesville, Chariton county, State of Missouri, to have and to hold said real estate, subject to the covenants and conditions hereinafter mentioned, together with the improvements thereunto belonging, unto the said parties of the second part and to their regular successors and assigns forever. And the said parties of the first part, their heirs, executors, administrators and assigns, and the said parties of the second part and their regular successors and assigns, covenant and agree to and with each other that the said parties of the second part and their regular successors and assigns shall have the exclusive right to use, possess, occupy, enjoy, rent, lease, convey or otherwise dispose of in any manner whatever all of the second story of the building now situated upon said lot hereinbefore described, free from the claim, right, trouble, molestation, suit, hindrance or interruption of the said parties of the first part, their heirs, executors, administrators and assigns, or any other person or persons claiming or to claim by, from or through them, or any of them, and that the said parties of the

second part, and their regular successors or assigns, shall at their own cost and expense make such additions, alterations and repairs as they may deem necessary to said second story, including the roof of said building, and that the said John F. Cunningham, his heirs, executors, administrators and assigns, shall not be chargeable either in law or equity with any portion of the expense incurred by reason of any additions or alterations or repairs that may hereafter be made to said second story or to the roof of said building. And that said parties further covenant and agree to and with the other that the said John F. Cunningham, his heirs, executors, administrators and assigns, shall have the exclusive right to use, possess, enjoy, occupy, rent, lease, convey or otherwise dispose of in any manner whatever, all of the first story of said building, free from the claim, right, trouble, molestation, suit, hindrance or interruption of the said parties of the second part, their regular successors and assigns, and that all additions, alterations, improvements and repairs done by said Cunningham or by any person or persons claiming under him shall be at his or their cost and expense, and that said Warren lodge No. 74, or any person or persons claiming under said lodge, shall not be held liable for any expense incurred by reason of such addition, alteration, improvements or repairs made to said first story of said building; and it is further covenanted and agreed by and between said parties of the first part, their heirs, executors, administrators and assigns, and the said parties of the second part and their regular successors and assigns, that partition of said described real estate shall not be made between the parties or any of them or between any persons claiming through or under any or either of them until such time, and upon such terms as the parties then owning said real estate shall mutually agree upon. And the said parties further covenant and agree that the said parties of the first part, their heirs, executors, administrators and assigns, and that the said parties of the second part, their regular successors or assigns, or any person or persons holding under, by or through them,

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or either of them, may at any time convey the fee simple title to such undivided interest as said parties or either of them may have in and to said described real estate and appurtenances thereto belonging, and that such conveyance or conveyances shall not invest the purchaser or purchasers with any other or greater title and interest in and to said described premises than such as are held and enjoyed by the original parties respectively under this conveyance."

It was the contention of defendants that certain conditions in said deed, which were binding upon both the said lodge and upon the grantor Cunningham, from whom defendants claim, were material elements which should be taken into consideration by the court in ascertaining the value of the ground which was to be the measure of plaintiff's damages upon the covenants of warranty of title; and with that view propounded the following questions to witness of the plaintiff:

"Mr. Chapman, what is the value of that lot of ground in controversy, subject to the right of Dr. Egan to use those premises and maintain a building thereon forever?" "Mr. Chapman, knowing the relations of the lodge to the owner of the lower room of the building on that lot as you do know it, I will ask you to state if in your judgment the one-half interest claimed to exist in the lodge is worth $300?" "With the limitations in the deed that the lodge claims under, and the only deed that it can claim under, providing that neither party shall partition the lot without consent of both the owners of the upper story and the lower story, what difference, in your judgment, does that make in the value of the land?"

Plaintiff's counsel objected to each one of these questions which the court sustained. It seems from an expression of the court while passing upon the competency of the proposed inquiry that it entertained the opinion that the holding of this court in the case on the first appeal limited the inquiry as to the value of the ground itself without reference to its value as affected by the conditions of the deed referred to. And it is

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the contention of the plaintiff as stated that the questions presented were *res adjudicata*. An examination of the instruction which this court held should have been given does not warrant such construction. It was general in its nature and it was not intended to limit the evidence to the value of the ground merely as such, but it must be taken as meaning the value of ground as affected by the character of the title. It is apparent that the ground itself would be worth more without restriction upon the power of alienation than with such restriction. The deed in question provides against partition except upon such terms and at such a time as may be mutually agreed upon by the grantors and grantees. As it appeared upon the face of the deed that there could be no partition of the property except as stated, the court would, as a matter of common knowledge, know that the estate would be worth less than an unconditional estate. it was a pertinent inquiry to ascertain what its value was as it thus stood. The court by refusing to allow the witness to answer the questions propounded, prevented defendants from introducing evidence tending to prove the real damage plaintiffs had sustained by reason of the broken covenants of their deed. All of said questions were proper for the purpose stated because they all had reference to condition in the deed that tended to impair the value of the estate in the land in controversy.

All other questions raised by the appellants are matters that have been adjudicated in former appeals and are therefore not open for further controversy.

For the error noted, the cause is reversed and remanded. All concur.

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C. H. CHANEY, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

Damages: EXCESSIVE VERDICT: EVIDENCE. Where the evidence is conflicting as to the amount of damages and the plaintiff remits a part of the verdict, the appellate court holds the remainder not excessive on testimony.

Appeal from Morgan Circuit Court.—*Hon. James E. Hazell,* Judge.

AFFIRMED.

Wm. S. Shirk for appellant.

The court erred in assessing plaintiff's damages at a sum in excess of that at which the plaintiff himself placed them. Shortly after the fire occurred the plaintiff presented to the defendant his claim for damages, placing his loss at forty-two dollars. Yet the court, by its finding and judgment gave him more than this sum. No authorities are needed to convince the court that this was error.

Forman & Neville for respondent.

No brief.

BROADDUS, J.—The finding and judgment in this case as it stands, after a remittitur in the circuit court by the plaintiff of $1.30, is $42. The only ground relied on for a reversal is that said finding and judgment are excessive.

It is admitted that plaintiff's fence was destroyed by fire set out by defendant's engine. Prior to the commencement of the suit plaintiff communicated with

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the defendant and placed his damages at $42. On the trial there was evidence tending to show that plaintiff's damage was in excess of the amount claimed, and other evidence that it was much less. Incompetent evidence, it is true, was admitted on the part of the plaintiff, but no exceptions were made to such evidence, consequently the action of the court in that respect is not subject to review by this court.

The court sitting as a jury heard all the evidence and rendered a verdict for $43.30. The plaintiff for some reason thought it best to remit $1.30 of this verdict, presumably for the purpose of making it consistent with his original claim for $42.

This is all there is in the case. For the reasons given the cause is affirmed. All concur.

HELEN B. HUFF, Respondent, v. CITY OF MARSHALL, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Negligence:** DEFECTIVE SIDEWALK: NOTICE: CONTRIBUTORY NEGLIGENCE. On the evidence in this cause plaintiff made a prima facie case by showing the defective condition of the sidewalk for such length of time that notice thereof could be inferred by the jury, and the defect was not so glaring that a prudent person would not have undertaken to use the walk.

2. ———: ———: INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. Instructions submitting the questions of negligence and contributory negligence are reviewed and *held*, when taken together, to have sufficiently presented the issues to the jury.

3. ———: ———: ———: ———. Instructions covering points covered by other instructions need not be given though in themselves proper enough.

4. ———: ———: SCOPE OF EVIDENCE. In showing the condition of a sidewalk, in order to bring notice to the municipality, the evidence need not be confined to the immediate place of the accident, but may properly take in the condition of the walk along the premises in front of which the injury occurred.

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5. **Damages:** EXCESSIVE VERDICT. A verdict for three thousand dollars, under the evidence in the record, is *held*, not excessive so as to justify the interference of the appellate court, especially since it receives the sanction of the trial judge.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

R. P. Spencer, J. F. Barbee and *Harvey & Gower* for appellant.

(1) A city is not an insurer of pedestrians upon its streets and sidewalks against accidents, nor is every defect or imperfection in its streets or sidewalks actionable. Dillon on Mun. Corp., sec. 1019; Elliott on Roads and Streets, p. 448; Brown v. Glasgow, 57 Mo. 156; Craig v. Sedalia, 63 Mo. 417; Carvin v. St. Louis, 151 Mo. 334. (2) Furthermore, there is no proof of actual notice on the part of the defendant city that there was a defect in the sidewalk where plaintiff fell. A defect, to put the city on notice, must be open and obvious; proof of hidden or latent defects, which would not attract or arrest ordinary attention, is not sufficient. Baustian v. Young, 152 Mo. 317; Carvin v. St. Louis, 151 Mo. 334; Franke v. St. Louis, 110 Mo. 539. (3) Plaintiff was guilty of contributory negligence and ought not to be permitted to recover. One who attempts to cross over a sidewalk as a part of a road known to him to be dangerous, when the dangerous place could easily have been avoided by passing around it, is wanting in due care, and the court may so declare as a matter of law. Cohn v. City of Kansas, 108 Mo. 387; Boyd v. Springfield, 62 Mo. App. 456; Dillon on Mun. Corp., sec. 789; Gerdes v. Iron & Foundry Co., 124 Mo. 347. (4) It was error to permit evidence to show the condition of the sidewalk for fifty feet in front of Mrs. Annie Duggins' residence, or between her front gate and the southeast corner of her yard or lot. The evi-

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dence should have been confined to the place of, or the immediate vicinity of, the accident, and to its condition at that time and to no other place. Bowles v. Kansas City, 51 Mo. App. 416; Hipsley v. Railroad, 88 Mo. 348. (5) The court also committed error in permitting witness Sparks to testify as to the condition of the sidewalk some three years prior to the time of the accident. Such evidence was clearly inadmissible and should have been excluded. Gerdes v. Iron & Foundry Co., 124 Mo. 347. (6) It was clearly error for the court to give instructions Nos. 1 and 2, on behalf of the plaintiff, and the giving thereof was fatal error. Shoe Co. v. Lisman, 85 Mo. App. 340; Linn v. Bridge Co., 78 Mo. App. 111; Carder v. Primm, 60 Mo. App. 423; Voegeli v. Marble & Granite Co., 49 Mo. App. 643; Goetz v. Railroad, 50 Mo. 472; Schroeder v. Michel, 98 Mo. 43. (7) The court should have given instruction No. 2 asked by defendant. The defendant was entitled to instructions covering every defense. Cahn v. Reid, 18 Mo. App. 115; Cameron v. Hart, 57 Mo. App. 142; Laughlin v. Gerardi, 67 Mo. App. 372. (8) The damages awarded by the jury to plaintiff were excessive and clearly showed that the verdict was the result of prejudice and passion. Haynes v. Trenton, 108 Mo. 123; Hurt v. Railway, 94 Mo. 255; Franklin v. Fischer, 51 Mo. App. 345; Nicholds v. Crystal Plate Glass Co., 126 Mo. 55; Adams v. Railway, 100 Mo. 555; Fairgrieve v. Moberly, 39 Mo. App. 31.

A. F. Rector and *Duggins & Rainey* for respondent.

(1) There is no merit in defendant's first objection. (2) Proof of actual notice of a defective sidewalk to the officers and agents of a city is not necessary, in order to a recovery for injuries received thereon. If the sidewalk was defective and out of repair and had been for a period of time sufficient for the city, its officers, and agents, to have known of it, had they exercised reasonable diligence, is all the notice the law requires. Under this evidence it is clear that the city had

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actual notice of the unsafe condition of the walk. (3) The question of contributory negligence was properly submitted to the jury and the verdict is final. A person is not bound to abandon the sidewalk because it is out of repair. Flynn v. Neosho, 114 Mo. 569; Chilton v. St. Joseph, 143 Mo. 202; Squires v. Chillicothe, 89 Mo. 226. . (4) The court did not err in confining the testimony to the walk between the gate and the corner of the lot. The evidence shows this distance to be only fifty or sixty feet and in front of same lot. The plaintiff did not know the exact spot on which she was injured. She said it was between the front gate and the corner. Mr. Freeman, the only other witness to the fall, said it was between the gate and the corner. The authorities cited by defendant are not in point. Baustian v. Young, 152 Mo. l. c. 325. (5) No error was committed by the court in giving instructions. Burdoin v. Trenton, 116 Mo. l. c. 371; Flynn v. Neosho, 114 Mo. 572; Taylor v. Springfield, 61 Mo. App. 266; Perrette v. Kansas City, 162 Mo. 249; Chilton v. St. Joseph, 143 Mo. 202; Schaaf v. Fries, 77 Mo. App. 346. (6) The damages assessed the plaintiff are not excessive.

ELLISON, J.—This is an action for damages resulting from personal injuries suffered by plaintiff in falling on one of the sidewalks in the streets of defendant. The judgment in the trial court was for the plaintiff.

Since the verdict was for the plaintiff we will state what the evidence in her behalf tended to prove. It appears therefrom that the board sidewalk at and along the place where she fell was in an unsafe condition by reason of the boards being nailed to stringers which had become old and rotten. That the walk had been in that condition for such length of time that the officers of the defendant city knew it, or might have known it if they had been diligent in that regard. Plaintiff also knew the walk was out of repair, but she did not know that it was in such state that it might not be used. On the day

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of the accident plaintiff was passing along the walk immediately behind some ladies who were going in the same direction when they met a gentleman walking in the opposite direction. In his attempting to pass these ladies he stepped on the end of one or two of the boards, which caused them to suddenly rise up so immediately in front of plaintiff as to cause her to fall over them and hurt herself seriously. At the time she was not looking down at the walk, but was carrying herself so that her vision was about as it is with ordinary pedestrians.

There can be no serious objection to the statement that the state of facts just indicated made a prima facie case for the plaintiff. The mere fact that she knew the condition of the walk, was not a bar to her recovery; it is only a matter to be considered by the jury in passing on her negligence. Flynn v. Neosho, 114 Mo. 569; Chilton v. St. Joseph, 143 Mo. 202; Squires v. Chillicothe, 89 Mo. 226. The evidence does not put this case in that class where a person voluntarily walks into a place so obviously and glaringly dangerous as that no prudent person would have undertaken it. The testimony of witness Sparks showing that the walk had been out of repair beginning back as long as three years, was asked to be stricken out, but no ruling was made thereon. His subsequent statement of specific repairs was ruled out. But there was other evidence hereinafter mentioned which showed the bad condition for a length of time sufficient to establish negligence of the city.

Counsel for the city, however, takes serious exception to the instructions given at plaintiff's request. We have examined them and do not believe they are subject to any just or substantial criticism. It is claimed that plaintiff's instructions one and two omit the hypothesis of plaintiff's own negligence, and yet direct a verdict for her based alone on defendant's negligence and her injury. Instruction one especially requires the jury to find that plaintiff was "without fault or negligence," and although instruction two does omit the hypothesis of plaintiff's case, yet as it was pointedly included in num-

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ber one, and as numbers three and four were devoted especially to the subject of plaintiff's negligence and want of care, and as all her other instructions included that proposition, the jury certainly must have understood that it was necessary for them to find that she was not at fault before giving her a verdict. Not only was the hypothesis thus made prominent and specific in plaintiff's instructions, but in defendant's series the jury are again cautioned in that regard.

Some of the instructions offered by defendant and refused might have been proper enough had the points presented in them not been covered by those which were given. But certain it is, that taking the instructions given, as a whole, the issues as presented by either side were fully and plainly presented, and the jury could not have misunderstood them. This is all that is required.

There was ample evidence tending to prove the bad condition of the walk. And there was evidence from which knowledge of its condition by the city could be reasonably and legitimately inferred. The proof showed its bad condition for a long space of time. One witness put it at "six months or more," while others showed it to have been in need of repair for a yet longer period. Objection was made to the scope of this evidence and that it was not confined to the specific place where plaintiff fell. We think the court kept the witnesses within proper bounds in this respect. The object was to show notice on the part of the city and it is unreasonable to suppose that the inquiry should be limited to the very board which caused the accident. The evidence was confined to conditions in front of the premises where plaintiff fell and within a short space along on that part of the walk.

The verdict was for $3,000 and it is insisted that it is excessive. We do not think so. If credit is to be given to the evidence in plaintiff's behalf her injuries were of such painful and serious character as to fully justify that amount and we feel that we are not justi-

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fied in interfering, especially since the verdict has received the sanction of the trial judge.

The case seems to have been earnestly contested and we have gone over the entire record with a view to ascertaining if anything occurred at the trial which would justify us in overturning the verdict of the jury and the action of the court thereon. We have found nothing which we deem of sufficient substance to authorize our interference, and, hence, affirm the judgment. All concur.

JOHN H. HUTCHINS, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Evidence:** DECLARATION OF WIFE: CONTRADICTION OF WITNESS. In a fire case the plaintiff was asked if his wife had not said in the presence of himself and others that the fire occurred in a certain manner. *Held*, the evidence was improper since a wife's declaration is incompetent against the husband, and could not be shown for the purpose of contradicting the witness.

2. ———: WRITTEN STATEMENT OF WITNESS: CONTRADICTION. The written statement of a witness as to the origin of a fire is incompetent except for the purpose of contradicting the witness, and the party can not complain of its refusal where he afterwards reads the statement as a part of the witness's testimony.

3. ———: ———: ———. Examining a witness on his written statement may be incompetent and is a matter within the discretion of the court since if the writing contradicts him it will appear upon its reading, and especially in this case is such examination improper where the questions had been answered before.

4. ———: REFUSAL OF, IMMATERIAL. Where the answer to a question can throw no light upon the issue on trial, it is properly refused.

5. **Damages:** MEASURE OF: INSTRUCTION: REFINEMENT. A criticism of an instruction relating to the measure of damages is *held* to be too refined for practical purposes.

6. **Trial and Appellate Practice:** INSTRUCTION: COVERED IN OTHERS: ABSTRACT. Though an instruction be unobjectionable in form, if it appears to have been covered by other instructions, it is not error to refuse it; and where it summarizes a vast array of facts and all the evidence does not appear in the abstract the appellate court can not review its refusal.

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Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

Wm. S. Shirk for appellant.

(1) How a written and signed statement made by the plaintiff, with reference to the origin of the fire, could be incompetent or irrelevant or immaterial, is beyond our comprehension. Even telegrams, letters, etc., are admissible. Hammond v. Beeson, 112 Mo. 190; Hatten v. Randell, 48 Mo. App. 203; Rheinhart v. Grant, 24 Mo. App. 154; Warlick v. Peterson, 58 Mo. 408; State v. Turlington, 102 Mo. 642. (2) The court also erred in striking from the record plaintiff's evidence, as to whether his wife had stated to some women in his presence during the progress of the fire, that Kit Lewis had set the barn on fire with his pipe. If she did so state in his presence and he remained silent, it was an admission. Ruprecht v. O'Malley, 60 Mo. App. 204; State v. Miller, 49 Mo. 505; State ex rel. v. Flynn, 66 Mo. App. 373. (3) It was likewise error to refuse to allow counsel for appellant to read the written statement of witness W. B. Hamilton to him, inasmuch as he could not read and had affixed his signature by mark, in order to ask him if he had made the statement and affixed his mark to it. Appellant had no other way to get an answer from him, as to whether it was his statement or not. (4) And it was error to refuse to allow appellant to ask witness Savage as to statements made the day before he testified, with a view of contradicting his evidence upon the witness stand. Defendant was denied the right even to finish its questions to the witness, on the point. That this was error is elementary law. (5) The second instruction given for the plaintiff was erroneous and misleading. Glasgow v. Lindell's Heirs, 50 Mo. 60; Wells v. Zallee, 59 Mo. 509; Phister v. Gove, 48 Mo. 455. (6) It was error to refuse defendant's first instruction. Railway v. DeGraff, 2 Colo. App.

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42; Railway v. Culers, 17 S. W. 19; Brown v. Railway, 19 So. Car. 39; Railway v. Keller, 36 Neb. 189; Railway v. Hart, 2 Tex. App. 370; Railway v. Morton, 3 Col. App. 155; Alexander v. Railway, 37 Mo. App. 609.

Blackwell & Son with *Alexander Graves* for respondent.

(1) The plaintiff was fully cross-examined (and without objection) upon his statement given to the agent of the appellant. After a full and exhaustive cross-examination on this statement the impression is sought to be made that the court ruled that this statement and the others, were incompetent, irrelevant and immaterial and that the defendant was not permitted to use them for any purpose. Hence the appellant having fully cross-examined plaintiff and having read in evidence the "statement" of plaintiff, has nothing to complain of and the authorities cited in point I of its brief are superfluous except Rheinhart v. Grant, 24 Mo. App. 154, which is in favor of respondent. 1 Greenleaf on Evidence (15 Ed.), sec. 463; Underhill on Evidence, sec. 350, p. 510. (2) Appellant's second ground of complaint is just as frivolous as the one already considered, and if anything is more unfairly presented. (3) The third point of appellant's brief complains that the trial court did not permit counsel to read to witness Hamilton the contents of his written statement. (4) We submit that the instruction is correct, and after reading what is said on this point in appellant's brief, it must be apparent that appellant is trifling with the court and adversary counsel. (5) A witness can not be contradicted or impeached by disproving his answers to irrelevant or immaterial questions or his statements concerning collateral facts elicited on cross examination. Brown v. Weldon, 27 Mo. App. 251; Gas Lt. Co. v. Ins. Co., 33 Mo. App. 348; McFadin v. Catron, 120 Mo. 252; State v. Rogers, 108 Mo. 202. (6) Every presumption will be made by the appellate court in favor of the action of the trial court in giving and refusing instructions.

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McGowan v. Ore & Steel Co., 109 Mo. 518; Muehlhausen v. Railroad, 91 Mo. 332; State v. Jump, 90 Mo. 171; Keim v. Railway, 90 Mo. 314; State v. Elliott, 90 Mo. 350; Miller v. Railway, 90 Mo. 389; State v. Partlow, 90 Mo. 608; Phister v. Gove, 48 Mo. App. 455; Baker v. Railway, 52 Mo. App. 602; Wilkerson v. Eilers, 114 Mo. 245; Harrison v. White, 56 Mo. App. 175; Henson v. Railway, 34 Mo. App. 636.

BROADDUS, J.—Plaintiff's cause of action is based upon defendant's liability for damages he claims to have sustained in the loss of his barn and its contents alleged to have been destroyed by fire on December 5, 1900, said fire being caused by the emission of sparks from one of defendant's engines while being operated over its railroad.

It is admitted by appellant that there was evidence tending to prove plaintiff's case, but it is insisted that but for the errors of the court in rejecting competent evidence and a proper instruction offered by the defendant and the giving of an improper instruction and in admitting incompetent evidence on the part of the plaintiff, the verdict would have been for the defendant and not for the plaintiff.

The appellant's abstract is made up of detached parts of the evidence and while respondent has filed an additional abstract for the purpose of supplying certain defects in that of appellant, the record remains in an incomplete condition so far as the testimony is concerned. However, we gather from what is before us that on the night of the day in question, plaintiff's said barn with its contents were destroyed by fire; that appellant's east-bound passenger train passed the barn emitting sparks from its engine; and that in a short time thereafter the barn was discovered to be on fire in the roof on the side next to appellant's railroad tracks, some of the witnesses testifying that the time between the two events did not exceed twenty minutes, and others not more than five minutes.

The respondent while testifying was asked by ap-

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pellant if during the progress of the fire his wife did not say to some other woman in the presence of respondent that Kit Lewis, a witness in the case, had set fire to the barn with his pipe to which the respondent answered, "No." The court upon motion of respondent struck the evidence from the record. The appellant claims that this was error as it operated to prevent the impeachment of respondent's evidence by showing by other witnesses that his wife did make the statement in his presence. The fault of the contention is that such a statement by the wife, if she made it, was not competent for any purpose. No statement made by the wife could be evidence of the origin of the fire as she was not a competent witness either for or against her husband, therefore, the action of the court in not permitting it to remain in the record was proper. For the same reason the action of the court in refusing to allow Mrs. Holland, a witness, to state what she heard respondent's wife say as to how the barn had been set on fire, is also affirmed.

One W. B. Hamilton, a witness for the respondent, it seems had made a written statement as to the origin of the fire which the appellant offered to read to the jury, but upon objection by respondent the court refused said offer. No good reason was presented or is seen for making such offer as it is not shown that it was for the purpose of contradicting said Hamilton; and certainly it was not evidence for any other purpose, therefore, the court was justified in sustaining the objection. But if this was not true, appellant has no cause for complaint inasmuch as the record shows that it was afterwards permitted to read this statement as a part of the evidence of said witness.

When the respondent was on the witness stand and while defendant's counsel was cross-examining him as to certain written statements made concerning the fire, the respondent objected on the ground that examining the witness on said written statement was incompetent, irrelevant and immaterial, which objection the court sustained. The respondent contends that this was not

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error as appellant had already examined the witness at great length and that the statement itself was afterwards introduced by appellant as evidence. Practically speaking, if the appellant's object was to impeach the respondent, such object was attained when the writing itself was introduced and read to the jury, if it should appear that it was materially different from his testimony in the case.

It is customary to allow a party to a suit much liberty in the cross-examination of his adversary's witness; but it has always been held that the courts may exercise a sound discretion and confine such cross-examination within reasonable bounds, otherwise the practice in that respect might result in confusing and in annoying the witness and thereby tend to defeat the real purpose sought to be obtained—the truth. But the appellant could not have been injured by the ruling of the court for the reason that the question had already been answered, as will be seen by the following questions and answers in reference to the interview at the time the statement was written, viz.:

"Q. In that same interview while you were making this statement was you asked this question: 'How long had you been in bed?' [meaning just before the fire.] Did you answer 'Not over three or four minutes?' A. Well, I will say as I do now. I do not know how long I was in bed. I dozed off when the little colored girl called me. I do not know how many minutes I had been in bed. Q. That is another thing you do not recollect of saying, not over three or four minutes? A. I say just as I do now. I do not know how long it had been. I dozed off when the little colored girl called 'fire.' Q. I want you to answer my question. I asked you to answer my question—I asked you if you do not remember of saying at the time this interview was taken, when asked how long you had been in bed when the alarm of fire was given, you did not answer, 'Not over three or four minutes?' A. I do not remember answering that question. Q. Did you say it or not say it?"

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There the objection was interposed and sustained. While the reason given for the objection may not have been a proper one, the action of the court in refusing to allow the question to be answered was justifiable for the witness had already made answer to it.

Albert Savage, a witness for respondent, when asked by the appellant where he was when the local freight went by the place where the fire occurred, stated that he was between the barn and the right of way, after which appellant started to propound a question as follows: "Did you not tell me this, and not longer ago than yesterday——."

Respondent objected because the question was "incompetent and immaterial," which objection the court sustained; and, we think, properly because an answer could throw no light upon the issue on trial, the uncontradicted evidence showing that the freight train did not pass until long after the barn in question had been on fire.

Appellant further contends that instruction number two, given for respondent, was erroneous. It is as follows: "If you find for the plaintiff you should assess his damages at such a sum as the evidence shows to have been the value of the property described in the petition and destroyed by said fire at the time and place of the fire not to exceed two thousand and five hundred dollars." It is claimed that this instruction "took from the jury all judgment on their part as to what the evidence showed the value of the property to have been." In other words, that the jury are commanded "to find for the plaintiff, not such sum *as they might believe* the value to have been *from* the evidence, but such sum as the evidence shows such value to have been, whether the jury *believed* such evidence or not." The appellant's criticism of said instruction is too refined for practical purposes. It is true, the jury must believe, but, at the same time, it must have evidence upon which to predicate its belief. It is the function of the jury in making up their verdict to give to each witness such credit as from all the circumstances he may be entitled

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to, and to weigh the force and effect of his testimony. And there is nothing in the instruction that in any manner infringes upon the rights of the jury in that respect. Furthermore, the appellant's sixth instruction, given by the court, is subject to a similar objection, if it be an objection, for the jury are there told that "rights of the parties should and must be determined upon the evidence introduced in the case," etc., without any reference as to whether they believed it or not. It may be assumed as true, from the very nature of men, that no one of sound mind would act upon evidence that he did not believe to be true. Another objection is made to said instruction which we do not deem of sufficient importance to notice.

The appellant further complains that the court committed error in refusing to give instruction number one asked on its behalf. Said instruction seeks to call the attention of the jury to numerous facts which, if proved, should be considered by the jury in making their verdict. The form of the instruction seems to be unobjectionable, but as all the evidence at the trial, or even an abstract of it, is not before us, we can not undertake to say whether said instruction should have been given or not given. However, from the meager record before us, it does appear that every issue in the case was properly called to the attention of the jury in appellant's second and third instructions.

It therefore follows that the action of the court in refusing to give said instruction number one was not error, as it has been repeatedly held that a cause will not be reversed for the refusal to give a proper instruction if other instructions to the same effect were given.

Upon the whole case the verdict seems to have been for the right party.

Cause affirmed. All concur.

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JAMES A. KIRK, Respondent, v. W. B. KANE, Appellant.

Kansas City Court of Appeals, January 5, 1903.

Appellate Practice: ABSTRACT: FILING MOTION FOR NEW TRIAL. That a motion for new trial was filed must be shown by the abstract of the record proper, and a mere recitation of its filing in the bill of exceptions is insufficient.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Howard Gray for appellant.

Filed brief and argument on merits.

J. W. McAntire and *E. O. Brown* for respondent.

While what purports to be the bill of exceptions is copied into the printed abstracts of the record, there appears to be nothing contained in the record proper showing the filing of such bill of exceptions. This is fatal. It has been uniformly held that a bill of exceptions can not prove itself. As no such entry appears in the abstract of the record proper, the bill of exceptions can not be noticed. State v. Ryan, 120 Mo. 88; Lawson v. Mills, 150 Mo. 428; Storage & Warehouse Co. v. Glasner, 150 Mo. 426; Butler County v. Grady, 152 Mo. 441; Shoe Co. v. Williams, 91 Mo. App. 511.

SMITH, P. J.—This case was here by appeal on a former occasion, as may be seen by reference to 87 Mo. App. 274, when the judgment of the circuit court was reversed and the cause remanded. Since then there has been another trial in which the plaintiff had judgment and the defendant appealed.

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The plaintiff in his brief insists that the appeal should be denied for the reason no entry appears in the abstract showing the filing of what purports to be a bill of exceptions. The defendant before the cause was submitted filed an additional abstract. The original abstract was not only defective in the particular suggested by the plaintiff, but it was further defective in that it did not show that a motion for a new trial had been filed, and this latter defect the additional abstract did not supply. It is true there is a statement in the bill of exceptions wherein it is recited that such motion was filed, but as was in substance said by us in the like case of Turney v. Ewins—just decided—the filing of the motion is a matter of record proper and is not evidenced by the bill of exceptions. Hill v. Combs (not yet reported); Crossland v. Admire, 149 Mo. 650; Lawson v. Mills, 150 Mo. 428; Western Storage Co. v. Glasner, 150 Mo. 426.

The action of the trial court in sustaining or overruling a motion for a new trial is a matter of exceptions which the bill of exceptions must show was acted on and exceptions duly saved, but the evidence of the filing of the motion, under the rulings in the cases just cited must be found in the abstract of the record proper. Matters of mere exception belong to the bill of exceptions and can not be proven by the recitals on the record proper (Nichols v. Stevens, 123 Mo. l. c. 119) and the other matters belonging to the record proper can not be proven by recitation in the bill of exceptions.

Since the abstract of the record proper does not show that a motion for a new trial was filed, and since no error appears upon the face of that record, we will affirm the judgment. All concur.

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MALLIE CRAWFORD, Respondent, v. DELPHIA DIXON et al., Appellants.

Kansas City Court of Appeals, January 5, 1903.

Allowances in Probate Court: SET ASIDE FOR FRAUD. D. died leaving a widow and several children, and about three hundred acres of land. After his death C. sued one of the sons for breach of promise of marriage and recovered judgment for $3,000. After this suit was brought and a short time before the judgment was rendered the widow took out letters of administration and waived her dower right. Whereupon the children each presented to the probate court a claim against the estate for labor for the father, aggregating more than its value. The same attorney who defended the breach of promise suit acted for each of the claimants. The claims were allowed, each claimant testifying for the other. C. then instituted an action in equity to set aside the allowances as procured by fraud and collusion with the purpose of preventing her from realizing on her judgment, and the trial court entered a decree as prayed for: *Held,* that the evidence justified the court in so doing and the decree was affirmed.

Appeal from Cedar Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

J. P. Veerkamp, J. E. Stephens and *Rechow & Pufahl* for appellants.

(1) The circumstance that the administration was delayed for a few months is no evidence of any fraud. The only way that title can legally pass to heirs is through an administration. State ex rel. v. Moore, 18 Mo. App. 406; Becraft v. Lewis, 41 Mo. App. 547; Boeger v. Landenburg, 42 Mo. App. 12; Adey v. Adey, 58 Mo. App. 408; Jacobs v. Maloney, 64 Mo. App. 270; Hendrix v. Dixon, 69 Mo. App. 204; Smith v. Denny, 37 Mo. 20. (2) The petition fails to state facts sufficient to constitute a cause of action and the objection to

the introduction of any evidence should have been sustained. Smith v. Sims, 77 Mo. 270; Reed v. Bott, 100 Mo. 66; Hoester v. Sammelman, 101 Mo. 624; Williams v. Railroad, 112 Mo. 496; Nichols v. Stephens, 123 Mo. 117; Smith v. Miller, (Tenn.) 42 S. W. 182; Bliss on Code Pleading, section 211; Redpath v. Lawrence, 42 Mo. App. 109. (3) In order to justify a court of equity to set aside a judgment for fraud, the evidence must be clear and cogent, and must show fraud in the very act of procuring it. Freeman on Judgments (3 Ed.), sec. 489; Ramsey v. Hicks, 53 Mo. App. 190; Hasler v. Schopp, 70 Mo. App. 475; Railway v. Warden, 73 Mo. App. 122; Smith v. Sims, 77 Mo. 270; Payne v. O'Shea, 84 Mo. 133; Irvine v. Leyh, 102 Mo. 206; Irvine v. Leyh, 124 Mo. 361; Murphy v. De France, 101 Mo. 157; Murphy v. De France, 105 Mo. 64; Richardson v. Stow, 102 Mo. 43; Stave Co. v. Butler Co., 121 Mo. 631; Hamilton v. McLean, 139 Mo. 685; Bates v. Hamilton, 144 Mo. 11; Fears v. Riley, 148 Mo. 59; Neun v. Building Ass'n, 149 Mo. 80; Moody v. Peyton, 135 Mo. 489; Nichols v. Stevens, 123 Mo. 116; Smith v. Miller, (Tenn.) 42 S. W. 182. (4) An illegal allowance or error is not sufficient to set aside a judgment. Jones v. Brinker, 20 Mo. 88; Lewis v. Williams, 54 Mo. 200; Murphy v. De France, 101 Mo. 151; Murphy v. De France, 105 Mo. 64; Cooper v. Duncan, 20 Mo. App. 359; Standard v. Lacks, 25 Mo. App. 69; Railway v. Warden, 73 Mo. App. 122. (5) Judgments of the probate court possess the same efficacy and solemnity, and the same presumption of validity attach to them as to judgments of the circuit court. Cooper v. Duncan, 20 Mo. App. 359; Johnson v. Beazley, 65 Mo. 250. (6) There could by no possibility be fraud when, as in this case, there were valid and legal claims against the estate. Appellate courts have sustained numerous judgments where the evidence was not nearly as convincing as in these claims. Koch v. Hebel, 32 Mo. App. 106; Ramsey v. Hicks, 53 Mo. App. 191; Rousick v. Boverschmidt's Adm'r, 63 Mo. App. 422; Bosard v. Powell, 79 Mo. App. 186; Hart v. Hart's Adm'r, 41 Mo. 443;

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Reando v. Misplay, 90 Mo. 254; Sprague v. Sea, 152 Mo. 330; Smith v. Sims, 77 Mo. 272; Henry v. McKerlie, 78 Mo. 429; Moody v. Peyton, 135 Mo. 492. (7) There is a misjoinder of parties defendant. Neither the probate judge nor the administratrix are necessary parties; the other defendants are not interested in each other's claims, and have no connection with each other. Mayberry v. McClurg, 51 Mo. 259. (8) The plaintiff had adequate remedies at law. First. She could have appealed from the judgments of allowances. Second. She could have resisted the order of sale. Third. She could have opposed the report of sale if any had been made, and have appealed from any of said orders. Casey v. Murphy, 7 Mo. App. 248; Fenix v. Fenix, 80 Mo. 33. Fourth. She could have moved to set the judgment aside under section 214, Revised Statutes 1899.

W. W. Younger and *Cole & Burnett* for respondent.

(1) On the death of the ancestor the title of land descends to the heirs; administration is not necessary to pass title of real estate to the heirs. R. S. 1899, sec. 2908; Thorp v. Miller, 137 Mo. 231; Chambers' Adm'r v. Wright's Heirs, 40 Mo. 482. (2) Petition states facts sufficient to constitute a cause of action, collusion or a judgment on a fictitious claim, constitutes a fraud in procuring the judgment. Wonderly v. Lafayette Co., 150 Mo. 635; Link v. Link, 48 Mo. App. 345; Bresnehan v. Price, 57 Mo. 422; Damschroeder v. Thias, 51 Mo. 104. (3) The evidence showed fraud in the very act of procuring the judgment. Wonderly v. Lafayette Co., 150 Mo. 635; Link v. Link, 48 Mo. App. 345. (4) The plaintiff was not a party to the proceedings in the probate court, and she could not interpose the fraud there and for that reason the strict rule does not apply to her. Irvine v. Leyh, 102 Mo. 207; Wonderly v. Lafayette Co., 150 Mo. 650. (5) Simply an illegal allowance or error is not ground for setting aside an allowance, but when an allowance was obtained by fraud it

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will be ground for impeaching the judgment and setting it aside. Mayberry v. McClurg, 51 Mo. 256; Miles v. Jones, 28 Mo. 87; Link v. Link, 48 Mo. App. 345. (6) As to appellant's point that plaintiff could not maintain a suit in equity to enjoin the wholesale attack upon her interests we refer to the following authorities: Stewart v. Caldwell, 54 Mo. 536; Dingle v. Pollock, 49 Mo. App. 480; Bobb v. Bobb, 76 Mo. 419; Baldwin v. Davidson, 139 Mo. 118; McGlathlin v. Hemery, 44 Mo. 355. (7) "By filing an answer and going to trial defendants waived any objection as to defect of parties." Stewart v. Gibson, 71 Mo. App. 232; Am. Smelter Co. v. Fire Assur. Co., 71 Mo. App. 661; Pike v. Martindale, 91 Mo. 268; R. S. 1899, sec. 602. (8) Appellant claims plaintiff had an adequate remedy at law. This plaintiff denies. She could not appeal from the judgments of allowances. She was not an heir, devisee, legatee, or creditor of Zimri Dixon's estate, nor was she a person who had an interest in his estate. She was a creditor of L. M. Dixon. Zimri Dixon owed her nothing, nor does his estate. R. S. 1899, sec. 278; R. S. 1899, sec. 214; Jones v. Jones, 47 Mo. App. 237; Cauley v. Truitt, Adm'r, 63 Mo. App. 356; Baldwin v. Davidson, 139 Mo. 118; State ex rel. v. Jones, 53 Mo. App. 207; s. c., 131 Mo. 194.

ELLISON, J.—This proceeding is to set aside certain allowances against the estate of Zimri Dixon in the probate court of Cedar county as having been procured by fraud and to set aside an order for the sale of lands to pay such allowances and to restrain the defendants from taking any steps to subject said lands to the judgment of such allowances. The decree was for the plaintiff. Whereupon the defendants appealed to the Supreme Court, which court transferred the case here on the ground that it had no jurisdiction.

Zimri Dixon died in September, 1895, leaving several children (all of age) and a widow. Four of these children and the widow are all that figure in this con-

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troversy. They are America, the widow; Delphia, a daughter, and George, Lincoln and Lewis, three sons—Lewis at the time of the trial being twenty-six years old and the youngest. The estate left consisted of between two and three hundred acres of land. There was no will, and if we except the matters here in controversy, there were no debts. In June, 1896, the year following his death, the widow applied for letters of administration on the estate and they were granted in July. Prior to this, the son, Lewis, got into trouble with this plaintiff, a young woman, and on March 18, 1896, she sued him in the Cedar Circuit Court for breach of promise of marriage for $3,000, and recovered judgment for that sum in October following. Thereafter, she caused an execution to issue on such judgment and levied upon said Lewis's one-eighth interest in the lands so left by his father and had the same sold, she becoming the purchaser.

It appears that George, Lincoln and Delphia never left the family home, continuing with their father and mother as members of the family and that Lewis, though at home some, was away at school a part of the time. The record does not disclose clearly what became of the other children, and they do not appear in the controversy. Between taking out letters of administration in July and this plaintiff's judgment against Lewis in October, George, Lincoln and Delphia presented claims to the probate court against the estate for five years' services in labor and work performed for their father, George's account including a sum for building a house on the farm. These claims aggregated a sum more than the value of the estate and, if sustained, will effectually cut out this plaintiff in her effort to make the amount of her judgment against Lewis. The substance of plaintiff's charge is that the claims are spurious and were concocted for the purpose of defeating her judgment.

At the trial there was evidence admitted in behalf of the defendants George, Lincoln and Delphia, tending to prove that they had performed services in doing

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farm work for their father and that George had built a house on the farm. That Delphia had aided in the housework; and that all of it was done on the promise of the father that they should be paid for it. Each of them and their mother denied any collusion or fraud. And the probate judge before whom their claims were allowed disclaimed any knowledge of fraud or collusion, and there is nothing in the case to show that he had. On the other hand, there are strong circumstances appearing in the case sufficient to excite grave suspicion as to the claimants, and to these is added some direct evidence bearing on the controversy sufficient, it seems, to lead the trial judge to conclude, after mature deliberation, that the claims were not honest ones and that they had been allowed by collusion between the parties.

While in a case of this character, we may determine it for ourselves, yet, when the evidence is largely from the mouths and conduct of witnesses, we are privileged to be largely influenced by the finding of the trial judge. King v. King, 42 Mo. App. 454; Snell v. Harrison, 83 Mo. 651; Sharp v. McPike, 62 Mo. 300; Cox v. Cox, 91 Mo. 71.

It is remarkable that the deceased, a man who avoided debts, should allow his whole estate to be eaten up by the labor of three of his children. That nothing was ever paid them, no account kept and no direction left as to their claims or their payment. No administration seems to have been thought of until after this plaintiff had begun her suit for breach of promise, but on the other hand, a suit for partition of the lands between the heirs had been filed. The claims of the two sons and the daughter were each for five years (it was stated that limitations had run against any further claim) and each was a witness for the other in proving them. The widow waived notice of presentation and the claims were put through, the probate judge testifying that there was "no fight." They were all represented by the same attorney. A full understanding of the evidence shows that this attorney had charge of the whole affair from the beginning. He was Lewis's

counsel in the breach of promise suit. He saw to the widow's appointment as administratrix. He made out the application for her in her absence. He went out to the farm and wrote up the inventory and appraisement. He stated in testimony that he did this to accommodate Mrs. Dixon. He waived service of notice as attorney for Mrs. Dixon, thus appearing to represent both sides. He stated in testimony that he did not represent Mrs. Dixon, and that his name came to be on the back of the claim by his showing her how the waiver could be made. That when his attention was called to it in court, he had his name erased and her own counsel to sign his instead. Yet the probate judge testified, that his record showed this attorney waived notice of presentment and demand, and that his recollection was that "he started in as attorney for the administratrix and probably in this claim waived notice for the administratrix as attorney." And that "it seems to me I heard something said that one attorney could not act very well for both sides, but I do not remember what it was now." At any rate, the beginning of the trial was arrested at that point and another attorney then appeared for the administratrix. He could not say who employed him. He, with Mrs. Dixon's approval, then and there signed her name to the waiver. He, however, stated that he had consulted with Mrs. Dixon before, and there is nothing to show that he had anything to do with the matter other than what an attorney, not aware of any collusion, might properly do. No subpoenas were issued for witnesses and those outside the family who appeared were the same in all cases. Yet the claimants stated they did not know who the witnesses for the other would be, and that they had not talked with one another about their own claims or how much they would be.

It seems that Mrs. Dixon waived her dower rights and elected to take a child's part. She could have had dower free from these claims and thus secured herself a home; but instead, she accepts that which must be taken from her if these claims are allowed to stand as

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valid against the estate. It is a strange circumstance of self-sacrifice and is urged by plaintiff as a link in the chain of her charge of fraud and collusion. It was also shown in this connection that when the attorney aforesaid was returning from the farm where he had been assisting Mrs. Dixon in inventories and appraisements, he stated, in answer to a question from the justice of the peace who was called upon to take Mrs. Dixon's release of dower in the estate, why she was doing so; and he answered that "the boys had been working there a good while and that they were going to probate the claim against the estate and sell it and buy it in to keep that Crawford woman [plaintiff] from getting any of it." Defendant's abstract shows this was objected to, but plaintiff has filed an additional abstract wherein it is stated that it was not.

We have not pretended to set out all the evidence heard. There were many circumstances against the honesty of defendant's claims, yet we concede that they each stoutly maintained that the amounts claimed by them were fair and were justly due. But we have concluded after a full examination of the record and argument in briefs and at the hearing to defer to the finding of the trial judge. The principles of law governing cases of this nature are well settled and the authorities will be found in the briefs of the respective counsel.

There are some technical points stated by defendants in their brief. Among them, that there was a defect of parties; that the petition did not state a cause of action, and that plaintiff had a complete remedy at law. We have concluded that these contentions are not well founded at this time. See authorities in plaintiff's brief. But, however that may be, defendants have stated that they prefer not to rest their case on such grounds, and ask the court to decide it upon its merits.

The judgment is affirmed. All concur.

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PETE BORDEN, Respondent, v. THE FALK COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Master and Servant:** FELLOW-SERVANT: ALTER EGO. Where the superintendent of the master is present directing the movements which result in the injury of an employee, there can arise no question of fellow-servant.

2. **Judicial Notice:** DOMESTIC ANIMALS: NATURE OF MULES. The mule is a domestic animal whose treacherous and vicious nature is so generally known that even courts may take notice thereof.

3. **Master and Servant:** NEGLIGENCE: JURY QUESTION. The failure of the master to take firm hold of a team of mules attached to a wagon, under which his servants were at work, is held gross negligence, and on a review of the evidence the case was properly sent to the jury.

4. ———: ———: CONTRIBUTORY NEGLIGENCE: ASSUMPTION OF RISK. On a review of the record no evidence of contributory negligence is found; nor does the question of the assumption of risk arise.

5. **Negligence:** CONTRIBUTORY NEGLIGENCE: PLEADING: INSTRUCTION. Though contributory negligence be defectively pleaded, yet if no objection is raised before the trial, evidence of such negligence is admissible and an instruction may be based thereon.

6. ———: INSTRUCTION: WHOLE CASE. An instruction covering the whole case should be so framed as not to exclude from the jury's consideration any point raised by the defense.

7. ———: ———: EVIDENCE: JURY. The province of a jury is not invaded when on a failure of evidence the court so declares, and an instruction is approved which ignores the defense of contributory negligence, assumption of risk, and fellow-servant, since there was no evidence to support such defenses.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

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Harkless, O'Grady & Crysler for appellant.

(1) The finding should have been for the defendant under the evidence. (2) The court erred in giving instruction No. 1 for the plaintiff. It concluded with a peremptory instruction to find for the plaintiff upon the facts contained in it and wholly ignored all the defense. This was erroneous. Corder v. Primm, 60 Mo. App. 426; Linn v. Massilon, 78 Mo. App. 111; McMahon v. Express Co., 132 Mo. 641; Goetz v. Railroad, 50 Mo. 472. (3) The foreman became a fellow-servant of the plaintiff in taking the teamster's place. Lee v. Railroad, 38 S. W. 509; Stevens v. Chamberlain, 100 Fed. Rep. 379; Hake v. Railroad, 88 Mo. 360; Glover v. Bolt Co., 153 Mo. 342; Byrnes v. Railroad, 55 N. Y. Sup. 269; Hull v. Canning Co., 78 N. Y. Sup. 617.

J. D. Brown and *M. A. Fyke* for respondent.

(1) The evidence of respondent made a clear case of negligence upon the part of the appellant. Nortengreen was the general superintendent of the appellant and had general charge of the works. (2) Appellant's criticisms of respondent's instruction number one is not well taken. (3) It certainly can not be claimed that respondent's evidence shows that he was guilty of any negligence. (4) Appellant introduced no evidence consequently there is no evidence in the record upon which to base the defense of contributory negligence.

SMITH, P. J.—This is an action to recover damages for personal injuries. It appears from the record before us that the defendant is a business corporation engaged in street railway construction and that the plaintiff was a common laborer in its employ at the time he was injured.

The defendant in carrying on its business of street railway construction was represented by a superintendent and foreman. It had in use a bending machine which set upon four wheels and had a tongue about four

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feet long, and which machine it desired to move. In order to do this it was necessary to fasten the tongue by a chain to the axle of a wagon so that when the wagon moved it would follow. One Thompson, a teamster in defendant's employ, was in charge of a wagon to which was attached a span of mules, which he backed over the tongue of the machine. The superintendent then ordered Thompson to go around and help hook the machine on to the wagon, saying that he would take care of the team. Said superintendent then ordered the plaintiff to leave his work on the railway track and to come and help move the machine and when the latter got under the wagon he found that the tongue of the machine did not come under the couplingpole of the wagon and Thompson thereupon took a crowbar and shoved the left forewheel around so that it did. While the plaintiff was under the wagon, "hunkered" down on his left knee working at the chain and endeavoring to hook it, the team started and one wheel of the machine, which latter weighed about 6,000 pounds, ran over his foot, severely injuring it. During the time the plaintiff and Thompson were engaged in hooking the machine on to the wagon, the superintendent was standing in front of the team, at what distance it does not appear, but it does appear that he did not have hold of it in any way. This brief outline of the facts disclosed by the evidence will, we think, suffice for a full understanding of the questions presently to be considered.

The plaintiff had judgment and the defendant appealed and assigns as grounds for a reversal of that judgment a number of errors.

I. It is contended by defendant that the instruction requested by it in the nature of a demurrer to the evidence should have been given. The defendant was present in the person of its superintendent and *alter ego* directing and superintending the movement of the machine, so that the question of whether this plaintiff was injured by the negligence of a fellow-servant does not arise in the case. Hoke v. Railroad, 88 Mo. 360; Moore v. Railroad, 85 Mo. 588.

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The superintendent ordered the teamster, Thompson, to leave the team and assist plaintiff in making the coupling of the machine to the wagon. The mule is a domestic animal whose treacherous and vicious nature is so generally known that even courts may take notice of it. The defendant can not be heard to claim that it did not know of the treacherous and unreliable qualities of this animal.

It seems to us that the defendant was guilty of the grossest negligence in ordering the teamster, Thompson, to leave his team of mules to assist plaintiff in the work of coupling the machine to the wagon without taking any further precaution for the protection of the plaintiff in his perilous position under the hind end of the wagon and in front of the machine, than to place himself in front of said team. Any man of ordinary prudence, under such circumstances, would have not only placed himself in front of the mules but he would with his hands have firmly grappled and held the bridlebits of each of them, or else stood behind or to the side of them and there held the lines so that a movement by them in any direction could have been restrained while the coupling was being made by plaintiff. The place in which the plaintiff was ordered to work was primarily safe enough but was rendered unsafe by the defendant's own negligence. Had the defendant's superintendent taken hold of the mules in either of the ways we have stated, the danger of plaintiff's position would have been minimized. The plaintiff's back was towards the team and it does not appear that he knew that the superintendent was standing before the mules without having hold of their bridlebits or the guiding reins.

While the plaintiff may have known that the place where he was engaged in making the coupling was not one of the greatest safety, he certainly had reasonable grounds to believe that by the exercise of ordinary care he could succeed in doing the required work with safety to himself. It is plain to us that if the defendant had exercised even ordinary care and precaution in securing the mules, the accident would not have happened. We

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are unable to discover any ground upon which to base the contention that evidence adduced by plaintiff shows that he was himself guilty of such negligence as to preclude his right to recover. And the same is true as to the assumption of the risk.

The case, in our opinion, was one that was properly submitted to the jury.

II. The defendant complains of the action of the court in giving the plaintiff's first instruction, not on the ground that it is not a correct expression of the law as far as it goes, but that it is erroneous in not submitting the defendant's three defenses of contributory negligence, assumption of the risk, and fellow-servant.

It is true, as suggested by plaintiff, that the first of these defenses was defectively pleaded, but as no objection was taken thereto before the trial, the general charge of negligence was a sufficient basis for the introduction of proof. Conrad v. DeMontcourt, 138 Mo. l. c. 325, and cases there cited.

It is also true that the rule has been long established in this State to the effect that an instruction for plaintiff covering the whole case should be so framed as not to exclude from the consideration of the jury the points raised by the defendant's evidence. Clark v. Hammerle, 27 Mo. l. c. 70; Sawyer v. Railroad, 37 Mo. 263; Griffith v. Conway, 45 Mo. App. 574; Garden Cultivator Co. v. Railway, 64 Mo. App. 305; Voegeli v. Marble & Granite Co., 49 Mo. App. l. c. 650.

But the difficulty with defendant's contention is not that the defense was not, for the reason just stated, sufficiently pleaded, but that there is no evidence requiring its submission to the jury. We do not, we think, invade the province of the jury when we say, as a matter of law, that there was no evidence adduced by the defendant tending to establish that defense, and, therefore, it was not error for the trial court to give plaintiff's instruction in the form it did.

The case, as we see it, was properly tried and the judgment must be affirmed. All concur.

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H. CARLISLE, Appellant, v. MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, January 5, 1903.

Common Carriers: RATES: NARROW AND STANDARD-GAUGE CARS: INSTRUCTION. Plaintiff with knowledge of an agreement existing between connecting carriers that three narrow-gauge cars of the one should be equivalent to two standard-gauge cars of the other in fixing the rates, shipped his stock over the narrow-gauge route to a point on the standard-gauge road. *Held*, on the evidence, that the rate thus calculated did not exceed the joint tariff rates of the carriers, and an instruction set out in the opinion is approved.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

Affirmed.

I. N. Watson for appellant.

(1) The court erred in giving instruction number eleven on behalf of defendant. (2) The fact that the shipper had knowledge of such unlawful or unreasonable charges or rules does not estop him from maintaining an action for money had and received for such unlawful or unreasonable charges or regulations. Heiserman v. Railroad, 63 Iowa 732, and cases cited; Carrier v. Railroad, 79 Iowa 87. (3) This instruction entirely ignores the issues made in this case. (4) Where an excessive charge is made by a common carrier, which is forbidden by statute, the person paying same has a right of action to recover back the excess so paid, and to do so it is not necessary that the payment be made under protest. Heiserman v. Railroad, 63 Iowa 732.

Elijah Robinson for respondent.

(1) The freight on all of the shipments in controversy in this case was paid voluntarily and without

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any protest, and can not be recovered from the defendant. Savings Assn. v. Kehlor, 7 Mo. App. 165; Wolfe v. Marshall, 52 Mo. 167; Buchanan v. Sahlein, 9 Mo. App. 552; Regan v. Baldwin, 126 Mass. 485; Bailey v. Paulina, 69 Iowa 463; Waubunsee County v. Walker, 8 Kan. 431; Town of Ligonier v. Ackerman, 46 Ind. 322; White v. United States, 11 Court of Claims 578; Meek v. McClure, 49 Cala. 624. (2) An action for a violation of the interstate commerce law can not be maintained in this court. Van Patten v. Railroad, 74 Fed. Rep. 981. (3) In no event ought plaintiff to maintain his action against this defendant. Good faith and fair dealing required at least that much at the hands of plaintiff.

SMITH, P. J.—The appeal in this case was improvidently granted to the Supreme Court from where it was transferred here by an order of that court.

The petition is in seven counts, in each of which it is alleged in effect that the defendant had made a certain specified charge which plaintiff had been compelled to pay for the carriage of certain cattle shipped by plaintiff from Chama, New Mexico, to a certain Missouri river point over the Denver & Rio Grande railway and that of the defendant, a connecting line, in excess of the joint or through tariff rates then in force on said railway lines. The action was brought to recover the excess charge so made and collected on each of said alleged shipments.

The answer was a general denial. There was a trial and judgment for defendant and plaintiff appealed.

The only assignment of error which we may notice is that relating to the giving of the defendant's eleventh instruction which is as follows: "If the standard-gauge cars were not and could not be used on the Denver & Rio Grande Railway Company at the time of the shipment made by the plaintiff from Chama on said railway, said company charged all other shippers under like conditions at the rate of three narrow-gauge cars to two standard-gauge cars, and if the plaintiff was notified

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of that fact and the correspondence read in evidence took place between him and the general freight agent, Wells, of the said Denver & Rio Grande Railway Company, then the plaintiff is not entitled to recover anything from this defendant on account of said rate of 'three to two' charged by said Denver & Rio Grande Railway Company.''

It appears from the evidence that the line of the Denver & Rio Grande railroad extends from Chama, in the Territory of New Mexico, to Pueblo, in the State of Colorado, at which last-named point it connects with the defendant's line of railway. At the time the plaintiff made his several shipments there was a joint tariff or traffic agreement in force between said connecting railway lines by which cattle in straight carloads could be shipped from a station of the defendant's railway in Kansas, Nebraska and Colorado to pastures located on the lines of defendant railway in Kansas which were intermediate between the shipping point and the market, or located on the defendant's railway not exceeding sixty miles out of the direct line from point of shipping to Kansas City on the following basis: ''Ascertain the through rate from originating point to Kansas City, Missouri, and from it subtract the tariff rate from feeding point to Kansas City, to the difference add $10 per car. The rate so obtained will be the rate to be charged from point of origin to the feeding point.'' It further appears that the car on which the above rate was given was what is known as ''a standard car,'' which was either thirty or thirty-six feet in length. The charges so provided in the rate sheets on the thirty-six-foot car were proportionally greater than on that which was thirty feet in length.

The Denver & Rio Grande railroad was a narrow-gauge railway, the carrying capacity of whose cattle cars was less than one-half of that of the standard-gauge cars. In view of this, that railway had printed and in force at the time of the plaintiff's several shipments, a rule which provided that on the joint tariff rate ''on cattle carloads per standard length broad-gauge cars''

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there would be an allowance of "three narrow-gauge cars for each two broad-gauge cars loaded out of Pueblo."

The plaintiff was advised of this "restriction" long before he made his shipments, for it appears that he wrote to the general freight agent of the Denver & Rio Grande railroad complaining of the restriction and requesting its recession, but that officer replied that his company had always assessed its "charges on a basis of three narrow-gauged cars to two broad-gauged cars of standard length, and that to comply with his—plaintiff's—request would operate as a discrimination against other shippers," etc. The plaintiff thereupon acquiesced in the enforcement of the rule and thereafter made his shipments.

When the plaintiff's cattle were shipped from Chama on the Denver & Rio Grande railroad the charges were made on a basis of three of its narrow-gauge cars to two broad-gauge cars of standard length. When they arrived at Pueblo they were received by defendant and the charges made on that basis were paid by it. As the Denver & Rio Grande railroad had not and could not haul any broad-gauge cars of standard length, it was necessary, in order to make it practicable to carry into effect the through tariff rates on standard cars from points on its line to others on the connecting line of the defendant that some such rule as that of the "three to two" be adopted and put in force. From all the testimony it seems that the requirement of this rule was neither unreasonable nor unjust to the shipper, for the carrying capacity of the three narrow-gauge cars was equal to that of two broad-gauge cars of standard length. The plaintiff shipped his cattle with the distinct understanding that the charges would be governed by this rule. We do not see that the plaintiff would have been in any better situation or that the charges would have been less had the Denver & Rio Grande railroad been a broad-gauge railway and had furnished the plaintiff for the shipment of his cattle broad-gauge cars, standard length. The application of the through tariff rates,

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to which we have referred, to the shipments, had they been so made, would not have worked out a result different from that of which plaintiff complains.

If the plaintiff, as we may infer was the fact, in loading his cattle in the cars of the Denver & Rio Grande railroad put a less number therein than he might, with reasonable safety, so that when the shipment was received by the defendant it found that it could safely place such cattle and haul them to the point of destination in a less number of standard cars than it had been obliged to receipt for, this circumstance manifestly argues nothing against the reasonableness of the "three to two" rule, nor does it afford any ground of recovery by plaintiff. The defendant received each of the plaintiff's shipments over the Denver & Rio Grande railroad on the "three to two" basis, and under its joint traffic arrangement with the latter railway company, doubtless, it was as much bound to carry them to the point of destination as if it had directly contracted to carry them from the initial point of shipment to that of destination for the joint tariff rate, and this without reference to the number of its own cars that was reasonably necessary to employ in completing the carriage.

Accordingly, it seems to us that the defendant's instruction was a proper declaration of the law applicable to the facts disclosed by the evidence. The other issues in the case were submitted by instructions unexceptionable in enunciation, and the finding, therefore, concludes all inquiry in respect to them.

The judgment will be affirmed. All concur.

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FRANK P. YOUNG, Respondent, v. BANK OF PRINCETON, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Chattel Mortgages:** DESCRIPTION: EVIDENCE. The description in a chattel mortgage should be so definite that a third person by its aid, together with the aid of the inquiries it suggests, may identify the property; and a description noted in the opinion is held insufficient to warrant the admission of the mortgage in evidence.

2. **Equity:** ATTACHMENT: GARNISHMENT. Plaintiff brought a bill in equity against defendant and others to follow and reclaim a fund he claimed as his own. He subsequently brought suits by attachment against the other defendants and garnished the defendant bank and other persons. *Held*, by the garnishment proceedings plaintiff abandoned his equitable claim.

3. **Banks and Banking:** DEPOSITS: DEBTOR AND CREDITOR: GARNISHMENT. Certain money was deposited in a bank to the credit of L. L. drew his check for the amount in favor of S. This was done at the request of M., who was a surety of L. to S., and M. took the check to the bank and requested it credited to the account of S. which was done, L.'s account being charged therewith. Subsequently L.'s creditor sued him by attachment and garnished the bank. *Held*, that on the deposit the bank became the creditor of L. and on the presentation of L.'s check and charging his account therewith L.'s interest in the funds ceased and the bank became the debtor of S., or if S. refused to accept, of M. and plaintiff's garnishment must fail.

Appeal from Mercer Circuit Court.—*Hon. Paris C. Stepp*, Judge.

REVERSED.

Alley & Alley and *Harber & Knight* for appellant.

(1) The check of William A. Lynam to G. W. Squires, or bearer, with authority to fill in full amount said Lynam had in the bank, from time such amount was filled in and bank had knowledge thereof, operated

as an assignment to the legal holders of said check, as against Lynam or any person standing in his place, or in fact any and every person, of such funds so in said bank; and hence said Stiles and Miller being the legal holders, and for a most valuable consideration, of this check, it operated from October 2, 1900, as an assignment to them of all the moneys said Lynam had in appellant bank; and it makes not the slightest difference whether the same was credited to the account of Squires and accepted by him, or he had any knowledge thereof, before the garnishment of October 8, 1900. Albers v. Bank, 9 Mo. App. 59; Burns v. Kahn, 47 Mo. App. 215; Shoe Co. v. Crosswhite, 124 Mo. 34; Loan Ass'n v. Bank, 126 Mo. 82; Bank v. Latimer, 64 Mo. App. 321; Grocer Co. v. Bank, 71 Mo. App. 132, and cases cited; Morrison v. McCartney, 30 Mo. 183; Chouteau v. Rouse, 56 Mo. 67; Lewis v. Bank, 13 Mo. App. 202; Lamp Co. v. Mfg. Co., 64 Mo. App. 115. (2) At the time of the service of garnishment Lynam had assigned for value the amount due him from the bank, and the bank had notice thereof prior to judgment against it, certainly if prior to its answering, the bank could not be held as the debtor of Lynam. See cases cited under paragraph 1; 2 Shinn on Attachment and Garnishment, 538-9, pp. 918, 919; Hendrickson v. Bank, 81 Mo. App. 332; Smith v. Sterritt, 24 Mo. 260; Knapp v. Stanley, 45 Mo. App. 264; Water Co. v. Harkness, 49 Mo. App. 357; Williams v. Scullen, 59 Mo. App. 30; Atwood v. Hale, 17 Mo. App. 81; Bank v. Cushman, 66 Mo. 103; Halker v. Kennessly, 143 Mo. 80. (3) The description of the property contained in said mortgages was wholly insufficient to the maintenance of any action in respect thereto. Jones on Chat. Mort., sec. 55; Stonebraker v. Ford, 81 Mo. 532; Trimble v. Keet, 65 Mo. App. 174; Boeger v. Langerberg, 42 Mo. App. 7; Steinecke v. Uetz, 19 Mo. App. 145; Chandler v. West, 37 Mo. App. 631; Jennings v. Sparkman, 39 Mo. App. 663; Hughes v. Menefee, 29 Mo. App. 192; Estes v. Springer, 47 Mo. App. 99-104. (4) Even if plaintiff had been the owner of the notes,

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and mortgages securing them, and there had been a sufficient description of the property, he could only follow the property itself; he could not follow the proceeds of the sale of such property. 2 Cobbey on Chattel Mortgages, sec. 636, p. 637; Ware v. Georgetown Cong., 125 Mass. 584; Waters v. Bank, 65 Iowa 234; Burnett v. Gustafson, 54 Iowa 132.

Ira B. Hyde & Son and *Orton & Orton* for respondent.

(1) The mortgaged property was sufficiently identified. That is certain which can be made certain. The authorities in this State only require such particularity of description that third persons by the mortgage itself and such inquiries as it suggests can identify the property. State ex rel. v. Althus, 60 Mo. App. 126; McNichols v. Fry, 62 Mo. App. 16, 17; Bank v. Shackelford, 67 Mo. App. 480; Williamson v. Bank, 69 Mo. App. 376. (2) Parol evidence is admissible to aid the descriptive terms employed in the mortgage and to show whether particular property was embraced. Bank v. Shackelford, 67 Mo. App. 480. (3) The $1,218.54 placed in the Bank of Princeton by defendant Lynam, and transferred to the credit of Squires by Stiles, by direction of Lynam, was attached and the bank garnished by plaintiff before Squires had any knowledge of the transaction. Squires never has accepted the money. He could not have done so after the attachment and garnishment. It then was and remains the property of defendant, Lynam, subject to plaintiff's mortgage and attachment. Sproule & Agnew v. McNulty, 7 Mo. 67; Briggs v. Block, 18 Mo. 283; Ridge v. Olmstead, 73 Mo. 579; Nichols v. Walker, 25 Mo. App. 368; Keithley v. Pitman, 40 Mo. App. 596. (4) The answers and the whole evidence show that Stiles acted solely as the agent of Lynam to give this money to Squires and that he never succeeded in doing so. Stiles has never interpleaded, or in any manner claimed this money as his property, although he was a witness in the case and took

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an active interest in the trial. Plaintiff is entitled to this money by his suit in equity and also by his suits of attachment. (5) That under the answer of defendant bank, both as defendant and garnishee, plaintiff was entitled to judgment for this money without any trial, because it admitted receiving the money from Lynam and that it had not paid it to Squires.

SMITH, P. J.—The facts disclosed by the record in this case may be chronologically and briefly stated in about this way, viz.: William A. Lynam, a cattle-trader residing in the northern part of this State, made to Scannel & Patterson his note for $866, to secure which he executed a chattel mortgage in which the property covered by it was described in this way: "Twenty head of one-year-old steers, color red, one black steer calf, one white steer calf, twenty-six head of steers coming two years old, all red." And to Scannell, Foster & Co. said Lynam made a further note for $1,050, to secure which latter he executed a further mortgage in which the property is described as "fifteen reds and roans, one white and four blacks, also twenty-seven head of one-year-old steers, reds and roans." It was provided in each of said mortgages that in case of an attempt to remove the cattle from either Sullivan or Mercer counties the payeees in the notes or their legal representatives might take possession of the cattle, etc.

Before the maturity of said notes the payees therein named indorsed and delivered the same so that they passed into other hands until one Holmes became the legal holder thereof, and after maturity he insisted on payment. Lynam not being able or willing to then make payment, he and the payees applied to the plaintiff herein to carry the same and they accordingly procured the possession of the notes and mortgages from Holmes and entered into negotiations with plaintiff in respect thereto, resulting in Lynam with one Cook executing to plaintiff their joint note for $2,060 with an agreement to transfer to him the mortgage notes as collateral security thereto, and accordingly the payees in the latter

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notes with Lynam delivered the same to plaintiff who paid over to them fifteen hundred dollars by a check for $1,000 and the balance in cash. The payees and Lynam, after the receipt of the $1,500, told plaintiff that if he would let them have the notes that they would take them to Holmes, obtain his indorsement thereon and then return them to him. Plaintiff assented to this and delivered to them the notes, but he never saw them again.

It appears from the testimony of Holmes, given at the trial, that he never authorized the payees of Lynam to sell or dispose of the notes. The payees and Lynam paid over to Holmes on the notes the check and money they had received of plaintiff. Holmes testified without objection that the payees assured him that they were to get the money of plaintiff on the note of Lynam and Cook. He further testified that shortly after the mortgage notes were returned to him, and the $1,500 obtained of plaintiff was paid to him, that he told the payees that if Lynam would let him ship the cattle to Kansas City and there sell them and if there was anything over after the payment of the balance due on the mortgage notes that he would pay it to him; and that the latter requested that he wait until a couple of days later and he would ship the cattle and accompany him (Holmes) to Kansas City. This was agreed to and Holmes and Lynam two days afterward went with forty-one head of cattle to Kansas City where the same were sold. Out of the proceeds of the sale Holmes was paid the amount still due on the mortgage notes and the balance of $1,218.54 was deposited in a Kansas City bank to the credit of the defendant, the Princeton bank. The mortgage notes were delivered to Lynam marked paid.

It appears that Stiles and Miller were sureties on a note of Lynam to Squires for $2,500. On October 1, 1900, the day after the sale of the cattle, Lynam gave his sureties a check on the defendant bank for $1,218.54, payable to "G. W. Squires or bearer." On the next day Stiles presented the check to the bank with a request that the amount be placed to the credit of Squires'

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account with the defendant bank. The cashier accepted the check, charged it to the account of Lynam and credited it to the account of Squires.

It appears that the cattle were shipped in the name of the defendant bank, but whether with its knowledge or approval does not clearly appear. It seems, however, that the Kansas City bank promptly notified the defendant bank of the deposit with it. It does not appear further than by inference, how the defendant bank became apprised that the deposit was to go to the credit of Lynam's account. Whether this fact was learned from the Kansas City bank or from Lynam, or otherwise, was not shown. There is no question but that the amount so deposited was the proceeds arising from the sale of part of the cattle by Holmes, or by Holmes and Lynam, and that it was placed to the credit of Lynam on the books of the defendant bank. Squires kept an account with the bank, but at the time his account was credited with the amount of the Lynam check he was absent from the State and it does not appear that he was made aware of the credit until the date of his garnishment presently to be mentioned.

To reach the amount thus in the defendant bank the plaintiff brought a suit in equity against Lynam and the said bank. In his petition he alleged the execution of the notes and chattel mortgages, with a description of the cattle contained in the latter; the purchaser of the same, and that the defendants, Lynam and the bank, had converted the cattle to their own use and had sold the same with notice of the mortgage liens, realizing therefrom the said sum of $1,218.54, which was on deposit in the name of defendant Lynam in the defendant bank; and then prayed that said sum be ordered to be paid to him—plaintiff. A few days after this suit was brought, plaintiff brought two suits of attachment against Lynam; one on the two mortgage notes and the other on the $2,060 note of Lynam and Cook. Squires and defendant bank were summoned as garnishees in these attachment suits. By the pleadings in these several actions the issue was made as to whom the pro-

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ceeds of the sale of the cattle belonged. The garnishment was not served until after the giving of the check, the presentation of the same to the defendant bank, the acceptance thereof, and the charging of the same to the account of Lynam and the corresponding entry of a credit therefor on the account of Squires.

It should have been previously stated that when Lynam delivered the check to Stiles and Miller, he directed that the amount of the check be paid to Squires on his note on which they were his sureties, or deposited to his (Squires') credit in the defendant bank.

After the pleadings were all in and before the commencement of the trial, the court consolidated all three actions and thereupon the defendants and garnishee demanded a trial by jury. This was refused and the court proceeded to hear and determine the issues without the aid of a jury.

During the progress of the trial the plaintiff offered in evidence the two chattel mortgages, to the introduction of which the defendant and garnishees objected on the ground that the description in the said mortgages were insufficient, vague and indefinite, etc. The court overruled these objections and admitted them.

The finding and judgment was for plaintiff and against the defendant and garnishee bank for the amount claimed, and the latter appealed.

I. Touching the first assignment of error in respect to the admission of the two mortgages in evidence, it is to be observed that the rule is now well established in this jurisdiction that a mortgage to be effectual must point out the subject-matter of it so that a third person by its aid, together with the aid of such inquiries as it suggests, may identify the property. Stonebraker v. Ford, 81 Mo. 532; Banking Co. v. Commission Co., 80 Mo. App. 443; Jones v. Long, 90 Mo. App. 8; Trimble v. Keet, 65 Mo. App. 174; Boeger v. Langerberg, 42 Mo. App. 7; Steinecke v. Uetz, 19 Mo. App. 145; Chandler v. West, 37 Mo. App. 631; Jennings v. Sparkman, 39 Mo. App. 663; Hughes v. Menefee, 29 Mo. App. 192; Estes v. Springer, 47 Mo. App. 99-104.

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It is to be inferred from the recitals in the mortgages already referred to that the cattle intended to be covered by the description were situate in Mercer or Sullivan counties, or in both. Could a stranger with the mortgage description have gone into these counties and with it, or the aid the mortgages suggested, have been able to identify the cattle called for by such description? It is a fact so generally known that we may take notice of it that the prevailing colors of cattle in that part of the State in which the above-mentioned cattle were situate are red and roan, and, therefore, without any mark or brand or situs, except that of county, or other individuating indicia of ownership, how could these cattle described as "red and roan" one and two years old, be identified among the thousands of like colors and ages in these counties? It is true that some of plaintiff's witnesses testified that of the forty-one head of cattle alleged to have been converted they could point out and identify seventeen head of them as the mortgaged cattle, and that they were enabled to do this because they had been familiar with the cattle since their purchase by Lynam, but without this familiarity they could not identify such cattle from the description in the mortgage, or by the aid of such inquiries as it suggested. We are unable to discover anything in the extrinsic evidence or in the pleadings that in any way remedies or cures the defect and insufficiency of the mortgage description. It is clear that the mortgages containing such descriptions, though duly recorded, were wholly inefficacious to impart notice to the bank that any particular cattle were covered by them, and it therefore follows that they were improperly admitted in evidence.

II. The vital question in the case is, whether or not the proceeds of the sale of the cattle at the time of the garnishment belonged to Lynam, for if so then the judgment of the court must be sustained. The theory of the plaintiff's garnishment is that the fund so on deposit belonged to Lynam, so that at the time of the drawing of the check the same was subject thereto. The

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garnishment claim to the fund concedes the title therein to be in Lynam and is wholly inconsistent with the claim thereto asserted in the prior equity suit. If the plaintiff was in equity entitled to the fund as owner and holder of the mortgages, then of course the same did not belong to Lynam and was not subject to his garnishment. By the garnishment proceedings he necessarily abandoned his equitable claim and the court seems to have taken that view of the case.

If it be conceded, as it must, that the title to the fund was in Lynam, and that it was properly on deposit in the bank to his credit, then what was there to prevent the exercise by him of his right to make a bona fide disposition of the same? The relation of debtor and creditor existed between Lynam and the bank, and when the latter drew his check in favor of Squires or "bearer" and the bank accepted the same by charging the amount thereof to the account of Lynam and crediting the same to the account of Squires this had the effect to put an end to the right and title of Lynam to the fund. It operated as an assignment. Albers v. Bank, 9 Mo. App. 59; Bank v. Latimer, 64 Mo. App. 321; Burns v. Kahn, 47 Mo. App. 215; Dickinson v. Coates, 79 Mo. 250; Shoe Co. v. Crosswhite, 124 Mo. 34; Building & Loan Assn. v. Bank, 126 Mo. 82. There was, independent of the negotiable quality of the check, ample evidence of a supporting consideration. Nor is there any question as to the bona fides of the transaction in respect to such check. When the bank accepted the check and charged the amount thereof to Lynam's account, this discharged its indebtedness to Lynam as to the amount of the check. Whether the bank paid over the amount of the check so accepted to the bearers, Stiles and Miller, or by their direction entered the same as a credit on the account of Squires with it, was no concern of Lynam for his title in the fund had passed beyond recall. The bank had in consequence of the assignment ceased to be his debtor. The assignment thus made being, as has been stated, prior to the garnishments, it must be regarded as passing a superior right

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to the assignee. The assignment being bona fide and based upon a sufficient consideration, was not open to question either by Lynam or the plaintiff, his creditor. Hendrickson v. Bank, 81 Mo. App. 332; Knapp v. Standley, 45 Mo. App. 264; Water Co. v. Harkness, 49 Mo. App. 357; Williams v. Scullin, 59 Mo. App. 30; Atwood v. Hale, 17 Mo. App. 81; Bank v. Cushman, 66 Mo. App. 103; Holker v. Hennessey, 143 Mo. 80; Smith v. Sterritt, 24 Mo. 260. The amount of the check was paid into the bank for the use and benefit of Squires, and the fact that the latter has not demanded it in any way of the bank is of no consequence. The bank is liable to him for it. It could not refuse to pay the same to him nor could it pay the same to Lynam, even if there were no garnishment. Squires has not released or offered to release the bank from its obligation to pay the deposit to him. If it should pay the amount to Lynam, or otherwise misappropriate the fund, it would be liable to Squires; or, if he declined to sue for or to receive the fund, or in any way estopped himself to claim it, no reason is seen why Stiles and Miller may not be entitled to recover it. It was given to them by Lynam as his sureties as an indemnity, and until they are discharged from their liability as his sureties they have a right to it, and especially so if Squires should decline to accept it.

In no view of the case which we have been able to take do we think that the plaintiff has any right to recover of the bank the amount of the fund, the proceeds of the sale of the cattle, in either or any of said actions and proceedings, and without noticing other points discussed in briefs of counsel, we shall reverse the judgment. All concur.

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JOHN P. CLARY, Respondent, v. GEORGE A. TYSON, Defendant; CITIZENS' STATE BANK, Interpleader, Appellant.

Kansas City Court of Appeals, January 5, 1903.

Sales: PRINCIPAL AND AGENT: OWNER: SECURITY: BILL OF LADING: ATTACHMENT: FRAUD. The interpleader bank allowed the defendant to buy hogs and draw his checks on it with the understanding that the bank should have two dollars per car for the use of the money. The defendant shipped the stock and delivered the unindorsed bill of lading with a draft to the bank. *Held*: (1) Defendant and not the bank was the owner of the hogs and there was no relation of agency between them. (2) That the bank was defendant's creditor and the unindorsed bill of lading with the accompanying draft operated as security to the bank for its debt, and was superior to the claim of an attaching creditor. (3) Whether the arrangement between the defendant and bank was affected with fraud was a question for the jury under all the facts.

Appeal from Buchanan Circuit Court.—*Hon. W. K. James*, Judge.

REVERSED AND REMANDED.

F. I. Foss and *Porter & Groves* for appellant.

(1) The arrangement between the interpleader bank and Tyson, by which the hogs were bought for the bank by Tyson in his own name was valid; there is no controversy between Tyson and the bank as to the ownership of the property; it is not claimed that the attaching creditor is in any manner injured by the transaction, his being an antecedent debt. Anderson v. Biddle, 10 Mo. 23. If the arrangement had been for a lien upon the property in favor of the bank, the lien would have attached to the property in Tyson's hands, and could have been enforced against the creditors of Tyson. Jones on Liens, sec. 63. (2) Whether the effect of the

agreement was to create a lien on the property for the money advanced, or to make Tyson a trustee of the bank, is not material; the effect and the principle are the same. If the purchase and consignment of the hogs in Tyson's name, under the circumstances, raised a question as to the ownership of the property, the question was settled by Tyson's draft on the consignee in favor of the bank, and delivery to it of the bill of lading. 1 Benj. on Sales (4 Am. Ed.), sec. 577. This whether the bill of lading is indorsed or not. Holmes v. Bailey, 92 Penn. 57; Hathaway v. Haynes, 124 Mass. 311; Shaw v. Bank, 101 U. S. 557. (3) As there was in the case no question of intervening rights arising out of Tyson's apparent ownership of the hogs, the interpleader's claim to the property could only be defeated by proof of actual fraud. There was no evidence to support plaintiff's allegations of actual fraud; but if respondent contends that there was, the contention, if sustained must result in a reversal because it raised a question which the court could not lawfully take from the jury by mandatory instruction. McDermot v. Barnum, 16 Mo. 123; Mathews v. Loth, 45 Mo. App. 459; Frankenthal v. Goldstein, 44 Mo. App. 189.

D. C. Reeves and *Stauber, Crandall & Strop* for respondent.

(1) In attachment proceedings the right to interplead is, under our statutes (R. S. 1899, sec. 417) in the nature of an action in replevin engrafted upon the suit by attachment. Burget v. Borchert, 59 Mo. 80; Hellman v. Pallock, 47 Mo. App. 205; Huiser v. Beck, 55 Mo. App. 668; Spooner v. Ross, 24 Mo. App. 599; Paper Co. v. Mangan, 60 Mo. App. 76. (2) The demurrer to the evidence was properly sustained by the trial court. Clark v. Railroad, 36 Mo. 202; Smith v. Railroad, 37 Mo. 287; Krampe v. Brewing Ass'n, 59 Mo. App. 277; Callahan v. Warne, 40 Mo. 131; Twohey v. Fruin, 96 Mo. 104. It is not an error to take the case from the jury where the facts and legal inference to be drawn

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therefrom will not support a verdict. Knapp-Stout v. Joy, 9 Mo. App. 47; Jackson v. Hardin, 83 Mo. 175; Mexico v. Jones, 27 Mo. App. 534; Reichenbach v. Ellerbe, 115 Mo. 588; Hite v. Railroad, 130 Mo. 132. (3) The arrangement between Geo. A. Tyson and the interpleader bank, constituted Mr. Tyson the absolute owner of the hogs instead of said bank. Kollock v. Emmert, 43 Mo. App. 566; McDonald v. Boggs, 78 Mo. App. 28.

ELLISON, J.—Defendant was indebted to plaintiff in about $300 and the latter brought suit by attachment against him. The sheriff seized a carload of hogs (then just arrived in St. Joseph) as the property of defendant. The appellant herein filed its interplea claiming the property. The hogs were sold by order of court and the proceeds, amounting to more than plaintiff's claim against defendant, will be held by the sheriff awaiting the result of the interplea. The trial court gave a peremptory instruction against interpleader at the conclusion of its evidence, without hearing from plaintiff. Interpleader then appealed.

The bank's cashier was the principal witness and he testified that the interpleader bank and defendant Tyson were of the same town in the State of Nebraska. That it was arranged between the bank and Tyson (who had no money) that the latter should buy stock of the farmers in the surrounding country and give his checks on the bank in payment and that it would honor them when presented. That the stock was to be driven in and shipped to market, a draft for the amount of the shipment with the bill of lading was to be delivered to the bank and the latter was to get "two dollars per car for the use of the money." The stock was so bought and was shipped to Harris & Co., commission men at St. Joseph, defendant delivering the bill of lading to the bank without indorsement. The witness stated that Tyson bought for the bank and seeks to convey the impression that the stock was the property of the bank gathered together by Tyson as an agent. But we refuse to allow that theory. The face of the whole case shows

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that the stock was Tyson's. The bank knew nothing of his purchases or his prices and had no interest in the profits or losses, or other interest, save two dollars per car for the use of the money advanced.

But the bank by advancing the money for the purchase of the stock became Tyson's creditor and had a right to secure itself to the amount of its claim. And it did effectually do so by receiving the draft and bill of lading from Tyson. The delivery of the bill of lading was a transfer of the property to the bank by way of security although it was not indorsed. Its indorsement was not a necessary thing to the validity of the transfer. Bank v. Homeyer, 45 Mo. 145; Bank v. Railroad, 62 Mo. App. 531; Dymock v. Railroad, 54 Mo. App. 400; Porter on Bills of Lading, secs. 496, 497, 504, 507, 508; Holmes v. Bailey, 92 Pa. St., 57; Hathaway v. Haynes, 124 Mass. 311. The property remained thus pledged to interpleader in the hands of the disinterested consignee at St. Joseph and was therefore superior to plaintiff's claim as an attaching creditor.

Of course, if it can be shown, as is charged, that the arrangement between the bank and Tyson was a fraudulent cover for him whereby he might conceal his deals and his property from his creditors, then the bank would lose its right through its guilt in the transaction. But that is a question of fact in which all relevant circumstances may be shown and about which the parties have the right to the opinion of a jury. The judgment will be reversed and the cause remanded. All concur.

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EDWARD E. WHITE, Respondent, v. THE FARMERS' MUTUAL FIRE INSURANCE CO., Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Evidence:** EXPERT: LIGHTNING-KILLED CATTLE: HARMLESS ERROR. Knowledge and experience are the test in determining whether a witness is qualified as an expert, and where he has no knowledge or experience in such matters he may not testify as to whether certain cattle were killed by lightning or not; but, however, where the defendant subsequently introduces evidence to the same effect the error is harmless.

2. ———: OBJECTIONABLE QUESTION: NEGATIVE ANSWER: HARMLESS ERROR. Where objection to a question is sustained and the witness, however, answered, "I don't know about that," the error is harmless.

3. **Pleading:** VARIANCE: INSTRUCTION: AFFIDAVIT. A petition alleged the killing of five head of two-year-olds and two head of yearlings. The evidence showed five milch cows and three yearlings. The instruction declared if the jury believed that said cattle or any part of them were so killed, then they should find the value of such cattle. The variance between the petition and the proofs is held harmless and does not affect the instruction since there was no affidavit showing in what respect the defendant had been misled.

4. **Interest:** CONTRACTS: CONSTRUCTION: STATUTE. The statute only allows interest on contracts and judgments, and where it was stipulated in an insurance policy that interest should not begin until sixty days after adjudication, meaning adjudication by the company which never in fact occurred, interest begins to run only from the date of the judgment.

5. **Arbitration and Award:** INSURANCE: CONDITION PRECEDENT: OUSTING COURTS OF JURISDICTION. Parties may contract that in case of difference as to the amount of a loss such difference may be settled by arbitration as a condition precedent to the bringing of suit in the courts, but where such stipulation amounts to an absolute prohibition to resort to the courts, then it is ineffective to prevent suit, and this doctrine applies to a county insurance company since the statute provides that they may sue and be sued.

6. ———: ———: DENIAL OF LIABILITY: OUSTING COURTS OF JURISDICTION. The insurer at all times denied that the assured's cattle had been killed by lightning. *Held,* this was a denial of of liability in toto and the court had jurisdiction to settle the liability, notwithstanding an arbitration clause in the policy.

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Appeal from Andrew Circuit Court.—*Hon. A. D. Burnes,* Judge.

AFFIRMED, *si.*

Kendall B. Randolph and *Frank Costello* for appellant.

(1) The court erred in sustaining plaintiff's motion to strike out a part of the answer. Nelson v. Von Bonhorst, 29 Penn. St. 352; Perry v. Cooper, 8 Mo. 205; Blaine v. Knapp & Co., 140 Mo. 241; Allen v. Davis, 11 Mo. 479; Ray v. Hodge, 13 Pac. 599; Krum v. Mersher, 9 Atl. 324; Salinas v. Wright, 11 Tex. 572; Gellespie v. Mather, 10 Penn. St. 28; Mason v. Graff, 35 Penn. St. 448. (2) Contracts must be construed according to the plain intent and meaning of the parties. Webster v. Meyer, 52 Mo. App. 338; Truman v. Stephens, 83 Mo. 218. An arbitration may either be "statutory," or "at common law." Williams v. Perkins, 83 Mo. 379; Lasar v. Baldridge, 32 Mo. App. 365; Quinlivan v. English, 42 Mo. 362; s. c., 44 Mo. 46. (3) Arbitration or a refusal to arbitrate on the part of the defendant is a condition precedent to a recovery. Murphy v. Mercantile Co., 61 Mo. App. 323; McNees v. Ins. Co., 61 Mo. App. 335; McCollough v. Ins. Co., 113 Mo. 606, and cases cited; Dautal v. Ins. Co., 65 Mo. App. 50; Sweringer v. Ins. Co., 66 Mo. App. 90; Johnson v. Ins. Co., 69 Mo. App. 226; Hooker v. Ins. Co., 69 Mo App. 141. (4) The court erred in permitting witness Hill to give an opinion to the jury as to how in his judgment the cattle were killed. Railroad v. Stock Yards Company, 120 Mo. 541, 550; Benjamin v. Railway, 133 Mo. 274; Hurt v. Railway, 94 Mo. 255; Muff v. Railway, 22 Mo.. App. 584; Hartman v. Muehlebach, 64 Mo. App. 565; Madden v. Railway, 50 Mo. App. 666; Turner v. Haar, 114 Mo. 335; Goins v. Railway, 47 Mo. App. 173. (5) The plaintiff's first instruction should not have been given for the very obvious reason that the petition alleges the cattle killed were five head of two-year-old

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cattle and two head of yearling cattle, while the evidence showed four milk cows and three yearlings. (6) Plaintiff's second instruction is open to the same objection as the first, and to the further objection that it required the jury to allow interest from April 26, the day the cattle were drowned, while the contract of insurance provides "the amount of loss or damage to be paid within sixty days after adjudication." R. S. 1899, sec. 3705.

Hewitt & Blair for respondent.

(1) A party can not complain that the court permitted a witness to testify against his objection to certain facts, if subsequently in the same trial he admits the facts brought over his objection. State v. Goddard, 162 Mo. 226. (2) Where a party adduces incompetent evidence he can not complain on appeal that his adversary was given the same privilege. State v. Palmer, 161 Mo. 175. (3) The clause in appellant's constitution: "All disputes . . . whether touching the point of liability or amount of loss must be settled by mutual agreement or arbitration; any other proceeding in court is entirely prohibited," constituted no defense and was properly stricken from the answer. 2 May on Ins. par. 492; 6 Lawson on R. R. & P., par. 3326; Same, vol. 5, par. 2087; 2 Story on Eq. Jur., par. 1457; 2 Am. and Eng. Ency. of Law, p. 570; Dadenfield v. Ins. Co., 154 Mass. 77 (27 N. E. 769); Haggard v. Morgan, 5 N. Y. 422; McNees v. Ins. Co., 61 Mo. App. 340; Strohmaier v. Zeppenfield, 3 Mo. App. 432; Secs. 8056, 8064, R. S. 1899. (4) The by-law set up in the answer is no defense. There was a denial of all liability and the answer showed such denial. Since the company denied all liability there was nothing to arbitrate. 5 Lawson on R. R. & P., par. 2087; 2 Am. and Eng. Ency. of Law, p. 581; Farnum v. Ins. Co., 83 Cal. 246; Rosenwald v. Ins. Co., 3 N. Y. 215; Bailey v. Ins. Co., 77 Wis. 336; Hamilton v. Ins. Co., 137 U. S. 370; Dautel v. Ins. Co., 65 Mo. App. 50; McNees v. Ins. Co., 61 Mo App. 341; Thomas v. Ins. Co., 78 Mo. App. 273; Montgomery v. Ins. Co.,

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80 Mo. App. 506. (5) Where there is a variance, the statute points out the method by which it is necessary to proceed in order to save the point. Sec. 655, R. S. 1899; Chouquette v. Railway, 152 Mo. 262; Bank v. Leyser, 116 Mo. 68; Bank v. Taylor, 69 Mo. App. 103; Pancoast v. Gas Fixt. Co., 60 Mo. App. 60; Lalor v. Byrne, 51 Mo. App. 583.

BROADDUS, J.—This is a suit against the defendant, a mutual fire insurance company, of which the plaintiff is a member, on a policy issued to him on November 15, 1897, by which, for a valuable consideration, defendant insured him, among other property, against loss by lightning on his live stock. He claims that on April 26, 1900, while said policy was in force, of said live stock five head of two-year-old and two yearling cattle were killed by lightning and became a total loss; that he gave defendant timely notice of his said loss; and that defendant's board of directors duly ascertained and determined his loss to be of the sum of two hundred and thirty-four dollars, which defendant has failed and refused to pay.

The defendant's answer admits the contract of insurance, but denies that the animals were killed by lightning. The defendant further answered setting up a condition of the policy that: "all disputes between this company and any member thereof touching the point of liability of this company to pay any loss, or the value of property destroyed or damaged by fire or lightning, shall and must be settled by mutual agreement or by arbitration; and other proceeding in court is entirely prohibited." And also setting out a by-law of defendant prescribing the duty of the adjuster in adjusting losses; and also providing in the event of a dispute between the assured and assurer, whether touching the question of the liability of the defendant to pay any loss, or the value of the property destroyed, for a settlement of such dispute by mutual agreement, or by arbitration; any other proceeding in court being pro-

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hibited. Further, that the plaintiff in pursuance of said by-laws, being dissatisfied with the refusal of the defendant's committee of adjusters to allow him anything on his said claim for loss, applied in writing to defendant to have said disputed loss arbitrated, in accordance with the rules of defendant regulating such arbitration; and that thereupon in accordance with such rules, arbitrators were appointed, time and place fixed for the hearing of the matter in dispute, at which time and place said arbitrators appeared when plaintiff refused to further submit to such arbitration. All of which is pleaded in bar of plaintiff's action.

On motion of plaintiff the court struck out all that part of said answer setting up said condition of the policy and by-laws, and the action of plaintiff in applying for arbitration and his withdrawal before the hearing and award, because the same constituted no defense to plaintiff's cause of action. The finding and judgment were for the plaintiff from all which defendant appealed.

After an examination of all the evidence we are satisfied that there was substantial testimony to show that the animals in question were killed by lightning. We will therefore give no further consideration to defendant's contention that the verdict of the jury is not supported by the evidence.

Specific objections are made to the actions of the court in admitting improper and refusing to admit proper evidence. One C. D. Hill, a witness on behalf of the plaintiff, was asked the following question, viz.: "After examining the cattle and taking all the facts and circumstances into consideration, tell the jury how, in your opinion, these cattle came to their death?" Defendant's objection was that the witness had not qualified as an expert. His answer was: "Well, I thought from the way this one was burnt and the way the others were bruised and the amount of thunder and lightning that night they was bound to all be knocked down by lightning." The objection should have been sustained and the action of the court in permitting the witness to

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give his opinion as an expert when in fact he had not qualified as such was error. Tandy v. Railway, 68 Mo. App. 431, and Pope v. Ramsey, 78 Mo. App. 157, cited by plaintiff, have no application whatever to the question. The same objection does not hold good as to the evidence of witness Alcott who was shown to have had experience and knowledge of animals that had been struck by lightning. Knowledge and experience is the test in determining whether a witness is qualified as an expert in cases of this kind. Notwithstanding it was error to admit the testimony of witness Hill as to what in his opinion caused the death of the cattle, it is claimed by plaintiff that the defendant afterwards condoned the error by introducing evidence corroboratory of said witness. The defendant introduced as a witness one W. B. Cline as an expert, who testified that animals struck by lightning showed, practically, the same marks and indications testified to by said Hill and other witnesses of plaintiff, and his evidence in that respect was very forcibly corroborative of theirs. As no injustice resulted to defendant by reason of the error, it affords no just ground for complaint.

It is also claimed that the court committed error in not permitting witness Piper to state whether or not the cattle could have gotten from the place where their carcasses were found without being carried by the water under a bridge situate between that place and where the cattle were last seen during the storm, the contention being that the cattle were drowned in the high water in the creek which was occasioned by an unprecedented fall of rain. Notwithstanding the objection was sustained, the witness did answer the question substantially by saying: "Well, I don't know about that." If he did not know the fact sought to be elicited, there was no harm done and it is not material whether the question was competent or otherwise.

On the trial it was shown that five milch cows and three yearlings were found dead, while the petition alleged that the cattle killed consisted of five head of two-year-olds and two head of yearlings. In view of

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this variance of the proof from the allegations of the petition, defendant insists that instruction number one given for the plaintiff was erroneous. Said instruction is as follows: "The court instructs the jury that the only issue in this case is, were the cattle in question killed by lightning, and if the jury believe from the evidence that said cattle or any part of them were so killed, then you should find for the plaintiff the value of such cattle so killed," etc. There is no claim that this instruction was not a proper one if there had been no variance between the allegations of the petition and the proofs, and we do not think that could make any difference under the circumstances as the defendant did not show by affidavit in what respect it had been misled. R. S. 1899, sec. 655; Chouquette v. Railway, 152 Mo. 257.

Instruction number two, authorizing the jury to allow plaintiff interest from the date of his loss, is not the law. The statute only allows interest on contracts and judgments. See chap. 40, R. S. 1899. In this case, under the contract of insurance, interest would not begin to run until sixty days after adjudication; that is, after adjudication by the defendant company, and as there was no such adjudication shown in evidence, interest would not begin until the date of judgment. The verdict of the jury fixed the value of the animals at $234, and allowed him $7 interest, making the total verdict $241. The defendant's criticism of plaintiff's fourth instruction is not well founded. It has been in constant use for a great while in the courts and has been often approved.

But defendant's main contention is that the court erred in striking out that portion of its answer setting out a certain part of the policy and the by-laws of defendant which it pleaded in bar of the plaintiff's right of recovery. We have indicated in the statement the parts of defendant's answer stricken out on plaintiff's motion. The question is directly presented whether it is in the power of an insurance company to make contracts and by-laws whereby their liability for alleged losses of property insured are to be determined by arbitration and resort to a court of law entirely prohibited.

It is conceded that such companies may by contract and by by-laws, provide for arbitration in cases where disputes may arise between the insured and the insurer, as to the amount and value of property distroyed by fire or lightning, but it is denied that the power exists to determine the tribunal wherein their liability shall be adjudicated. County insurance companies like the defendant are creatures of the statute. All their rights, duties and powers are conferred. The very statute that created them provides that they may sue and be sued. Sec. 8056, R. S. 1899.

In McNees v. Ins. Co., 61 Mo. App. 335, it was held that, "though parties can not oust courts of their jurisdiction to try causes by providing that all matters pertaining to the cause of action shall be submitted to arbitration, yet it is well-settled law that the amount of loss or damage may be so submitted." In Murphy v. Mercantile Co., 61 Mo. 323, it was held that, "the arbitration provision in a policy was absolute and mandatory . . . and such arbitration under the terms of the policy was a condition precedent to the defendant's liability." The terms of the policy in that case provided that in the event of a disagreement between the assured and the assurer as to the amount of loss or damage, the dispute should be settled by arbitration, and no suit or action for recovery on the policy should be sustainable in any court of law or equity unless such requirement for arbitration should be complied with. The ruling in the former case was expressly held not to be in conflict with that of the latter.

The case under consideration is very different wherein the provision for arbitration is not a condition precedent to defendant's liability but is an absolute prohibition of his right to sue either before or after arbitration. But we understand that it is conceded that if defendant's liability is denied in toto, that question may be settled in the courts. If the defendant's denial at all times that plaintiff's cattle were not killed by lightning was not a denial of all liability under its contract, it would be hard to conceive what would amount to such a

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denial, unless we accept defendant's idea that it must be a denial of the validity of the contracts itself. But no such meaning was ever attached to the language before, according to our understanding, and we do not think it can be found in the books—*reductio ad absurdum.* As the defendant denied all liability there was nothing to arbitrate. Dautel v. Ins. Co., 65 Mo. App. 44; McNees v. Ins. Co., 61 Mo. App. 335; Thomas v. Ins. Co., 78 Mo. App. 268; and Montgomery v. Ins. Co., 80 Mo. App. 500. The defendant has failed to recognize the distinction between cases where certain conditions of a policy of insurance to make proofs of loss, keep books, or things of a similar character; for the failure of which the liability of the company will not attach, and cases where all liability is denied.

The respondent has filed a motion to dismiss the appeal because the appellant has not complied with the law and rules of court regulating appeals, but we think there has been substantial compliance with both the law and the rules of the court in that respect, therefore said motion is overruled.

For the error noted the cause is reversed unless plaintiff shall in ten days enter a remittitur of seven dollars allowed by the jury as interest in computing the amount of the verdict, in which case the cause will stand affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. JOHN H. FULKERSON, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Assault:** EVIDENCE: IDENTITY OF ASSAILANT. The evidence relating to an assault upon the prosecutrix is reviewed and held sufficient to send to the jury the question of identity of her assailant, notwithstanding she was largely contradicted in her description of the apparel worn by the defendant on the occasion.

2. ———: WHAT SUFFICIENT TO CONSTITUTE. The defendant came, in the absence of the family, to the house where the prosecutrix was serving as a domestic and asking for a drink followed her into the kitchen, and after asking her some more or less significant questions placed his left hand over the door and his right hand upon her arm. Thereupon she jerked loose and ran through the dining-room and hall up stairs—he following to the stairway. *Held,* sufficient to constitute an assault. (Cases considered.)

3. ———: IDENTITY OF ASSAILANT: EVIDENCE: PHOTOGRAPH. The fact that on the next day after the assault the prosecutrix was told that a photograph handed her with the view of her identifying her assailant was the photograph of the defendant, does not render such photograph inadmissible in evidence on the trial.

4. ———: INDICTMENT: SUFFICIENCY OF. An indictment set out in the opinion is held sufficient in form to charge an assault. (Cases reviewed.)

5. ———: ———: ———. *Held,* further, that said indictment sufficiently informed the defendant of the nature and cause of the accusation, as an assault may be charged in general terms without specifying the manner in which it was made.

ON MOTION FOR REHEARING.

6. ———: WHAT CONSTITUTES: INDICTMENT: INSTRUCTION. An indictment charged that an assault was made for a lustful and immoral purpose. An instruction authorized the jury to convict although the assault was not made for such purpose, since those words were surplusage and not necessary to constitute an assault.

Appeal from Johnson Circuit Court.—*Hon. W. L. Jarrott,* Judge.

AFFIRMED.

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A. B. Logan for appellant.

(1) The indictment does not charge any offense, and is fatally defective in this: It does not charge the acts of defendant to have been either willfully or unlawfully done. State v. Green, 11 Mo. 585, and authorities therein cited. (2) The indictment is fatally defective in not including, "and so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that he, the said John H. Fulkerson, her the said Nettie I. Madden, in the manner, and by the means aforesaid, did unlawfully assault, against the peace and dignity of the State." Unless it so concludes, the indictment is fatally defective, and will not support a conviction under it. Constitution of Mo., art. 2, sec. 22; State v. Myers, 99 Mo. 107; State v. Clay, 100 Mo. 571; State v. Stacey, 103 Mo. 11; State v. Terry, 109 Mo. 601; State v. Kreuger, 134 Mo. 262; State v. Sanders, 158 Mo. 610; State v. Ferguson, 152 Mo. 92; State v. Lichliter, 159 Mo. 98; State v. Patterson, 95 Mo. 402. (3) The court erred in admitting, against the objections of defendant, the photograph marked exhibit "A," and in allowing any evidence connected therewith. (4) The court erred in giving instruction No. 1 to the jury, as asked by the State. State v. Clay, 100 Mo. 583; State v. Burks, 159 Mo. 573.

J. W. Suddath for the State.

(1) A battery includes an assault, and every touching of another's person or the clothing of a person, in a rude, insolent or angry manner, constitutes a battery. Kelley's Criminal Law, sec. 571. 1 Am. and Eng. Ency. Law (1 Ed.), page 783; Desty's Am. Crim. Law, sec. 130a, 130e; Johnson v. McConnell, 15 Hun 293; 4 Century Digest 793; Murdock v. State, 65 Ala. 520; Hunt v. People, 53 Ill. App. 111; State v. Philley, 67 Ind. 304; Thompson v. State, 43 Texas 583; State v. White, 52 Mo. App. 285; Commonwealth v. McKie, 67 Mass. 61. (2) Indictment for common assault need

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not state the manner nor the intent but merely charge in the words of the statute. State v. Cox, 43 Mo. App. 328; State v. Clayton, 100 Mo. 516; State v. Chumley, 67 Mo. 41; State v. Karnes, 51 Mo. App. 293; State v. McDaniel, 40 Mo. App. 256; State v. Phipps, 34 Mo. App. 400; State v. Elvins, 101 Mo. 243; State v. Chandler, 24 Mo. 371. (3) If, after striking out a portion of the indictment as surplusage, enough be left to make full and substantial charge of the crime intended to be charged, then such striking out is admissible and the indictment is good. State v. Myers, 99 Mo. 107.

BROADDUS, J.—The defendant was indicted and convicted for an assault upon the person of a female named Nettie I. Madden.

A brief review of the evidence shows that the prosecutrix on Sunday, May 20, 1900, the day on which the offense is charged to have been committed, was a domestic servant in the family of one William R. Rice, who resided about one and one-fourth miles south and three-fourths of a mile east of the village of Columbus, Johnson county, Missouri; that the defendant lived with his mother two and three-fourths miles south and three-fourths of a mile east of said village. The prosecutrix testified that on the day named, at about one-quarter to twelve o'clock m., while she was alone in the Rice dwelling, a man came to the house and knocked at the front door; that she answered the knock, whereupon the said man asked for Charley Rice, a son of William R. Rice; that she told him that said Charley Rice had gone to church and that thereupon he asked for a drink of water, at which time she left the front door and started to the kitchen, passing through several rooms, the man following; that when she got into the kitchen he asked her if she was not the young lady who had been staying there and she told him no; that he then asked her if she was not a grass widow, when she again answered no, upon which he walked to the door and asked her if she knew him, and when she answered that she did not, he

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said he would tell her his name if she would not tell any one; that he then told her, amongst other things, after asking her if she knew Doctor Morrow, that the latter had sent him down to get acquainted with her; that she told him she did not see why Doctor Morrow had sent him down for that purpose, at which he laughed and went and put his hand on the door when she started to run out of the room; that he then put his left hand over the door and placed his right hand on her arm, whereupon she jerked away and ran through the dining room and hall and up the stairs, he following until he got upon about the third step of the stairs—she being then on the top step—when he called out and said he had something to say to her; that she then ran into a room and shut the door.

The defendant denied that he was the person who committed the assault and introduced many witnesses to prove an alibi.

The prosecutrix did not recognize the person at the time of the assault as that of the defendant, but she stated that she thought she had seen a man who acted like such person, and when confronted with defendant at the trial unhesitatingly and positively identified him as the man who had made the assault. She stated that she had seen him in August, 1898, or 1899, when he wore a full beard (the defendant was clean-shaven at the time of the assault) at which time he had come to her father's house hunting a mad dog, on which occasion she had given him a drink of water. She stated, also, that on the morning following the assault when she was shown a photograph of defendant that she became positive that he was her assailant, and that she was informed when Rice came home from church on the Sunday named that the defendant was clean-shaven. This photograph, after being identified by the prosecutrix as a true picture of the person who assaulted her, was introduced as evidence and inspected by the jury.

It was also sought to identify the defendant as the wrongdoer by a description of the clothes he wore, of the horse he rode and the direction he was seen going

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on the day named, the prosecutrix stating that the person who assaulted her wore a light gray suit, a "lay-down" collar, red necktie and a brown hat and tan-colored shoes. On cross-examination she added to this description "a white starched shirt and a vest of a light color." The defendant introduced a number of witnesses, some of them members of his own family, who testified that on said Sunday he wore a black coat, light trousers, a white hat, a red necktie, and no vest. Two witnesses for the State testified that defendant at said time was wearing a light-colored suit. All agree, however, that he had on tan-colored shoes.

One witness, Samuel Burge, testified that in about a week from the day of the assault he saw defendant coming out of the house of Doctor Morrow and that he met him where, or near where, they had met on the Sunday before, and defendant said to him, "if the Rices ask you how I was dressed, tell them you don't remember."

It was shown that in order to go home from Columbus, where it is admitted defendant was on the Sunday in question a short time before the assault was made upon Miss Madden, he would have to pass by the said Rice place; but it was also shown that there was a road which branched off of said other road before reaching the Rice place which led by what the witness called "the Neal Doggett place." The defendant testified that he took this latter road as he was in quest of a fishing party at Blackwater creek about four miles further south, consequently he could not have been at the Rice place. He was corroborated in this by several witnesses who testified that they saw him on said road. And there were other circumstances introduced which very much strengthen this evidence. Several witnesses for the State, however, say that they saw him after he had passed the road that led by Doggett's, going in the direction that led by the Rice place.

The evidence showed that the defendant had a brother, Reuben, who resembled him greatly in appearance and that one of them was often mistaken for the

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other. It was also shown that they were both together on the Sunday in question and that both were riding sorrel horses very much alike, only that the one ridden by defendant was a pacing horse and the other was not. Reuben states that he went from Columbus home on that day, riding his own horse and passing by the Rice place; and one of defendant's witnesses, named Kavanaugh, testified that he saw, as he believed, Reuben going by in the direction of the Rice place but that he was riding the pacing horse.

We have not given even an abstract of all the evidence, only a brief outline of the most important, from which it may be readily seen that there was a serious conflict in the testimony. But enough has been stated to show that there was important evidence tending to establish defendant's guilt, which left that question to the sole determination of the jury.

The character of the prosecutrix for chastity and her reputation for truth was not attacked, but defendant contends that she was so overwhelmingly contradicted in her description of the clothes worn on the occasion by the man she alleged had assaulted her, that she is not entitled to belief, and that therefore the whole case failed and the court should have instructed for an acquittal. It is possible that the jury in considering that part of the evidence took into consideration (as they might with propriety have done) the alarming situation of the prosecutrix and made due allowance for a failure under the circumstances to note accurately the dress worn by her aggressor. It is assumed that she was a modest, virtuous female, as there is nothing in the record showing otherwise, and we can well conceive how, on such an occasion, whilst all alone and no one near to defend her, she might readily make a mistake both as to the dress and person of her assailant. There is nothing in the record to show that the jury were influenced by either passion or prejudice.

But defendant contends that notwithstanding he may have been guilty of the act for which he stands charged, it does not constitute any offense known to

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the law—that it was not in and of itself an assault. In State v. White, 52 Mo. App. 285, it was shown that the defendant, who was a physician, had hold of the hand of the prosecutrix, or that he retained his hold upon her hand against her will (making the while solicitations for sexual intercourse with her) for a lustful and immoral purpose. The court held that the facts constituted an assault. The claim is made, however, that the case cited is different from the one here, for in the former the defendant solicited sexual intercourse, which element is lacking in the latter. We think the two are much alike in the facts and the same principle applies to both. We can not see any difference in effect whether the solicitation was made by word of mouth or by actions. Actions are often as expressive as words, and sometimes much more so. On this question the defendant has called our attention to the cases of State v. Priestly, 74 Mo. 24, and State v. Owsley, 102 Mo. 678. both of which were for rape and in which it was held: "To warrant a conviction for an assault to commit a rape, the evidence must show that it was the defendant's intention, if it became necessary, to accomplish his purpose at all events regardless of any resistance the woman might make." Surely, it is not to be contended that the intent in a case like the present one must be shown to have been on the part of the defendant of such a nature that he would accomplish his lustful purpose against any resistance the woman might have made. That would have made it an assault to commit a rape; but this is just what the reasoning of the defendant's counsel would lead us to.

The law of the case is also stated in Goodman v. State, 60 Ga. 509, where it was held: "It was an assault and battery for a man to put his arm licentiously, though tenderly, about the neck of a woman against her will." See also, Thompson v. State, 43 Tex. 583, and Commonwealth v. McKie, 67 Mass. 61.

It is claimed that the court committed error in allowing defendant's photograph to be submitted to the jury as evidence, for the reason that the prosecutrix

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was told prior to the time she first saw defendant after the Sunday in question that the picture represented the defendant. She stated that she was unable to identify her assailant by name until she saw defendant's photograph the next morning and was told to whom it belonged. The fact that she had been shown the photograph and told whose it was could make no difference, for the object was to enable her to identify the person by the picture. Because she was told that the photograph was that of the defendant was immaterial, for its very production in the presence of the defendant would tell the jury to whom it belonged.

The defendant's objection to instruction number one given for the State is disposed of by what has already been said and it will not therefore be further noticed.

The defendant unjustly insists that the indictment is not sufficient to sustain a conviction. Omitting caption it is as follows: "The grand jurors for the State of Missouri, impaneled, sworn and charged to diligently inquire for the body of the county of Johnson in the State of Missouri, upon their oaths present and charge: That John H. Fulkerson on the 20th day of May, 1900, at Johnson county, Missouri, did then and there unlawfully assault one Nettie I. Madden, by then and there placing his hand upon and catching hold of the said Nettie I. Madden, with the intention, and for a lustful and immoral purpose, and against the will of the said Nettie I. Madden, against the peace and dignity of the State."

It is contended that the indictment is fatally defective in not concluding with the words, viz., "And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that he, the said John H. Fulkerson, her, the said Nettie I. Madden, did unlawfully assault against the peace and dignity of the State." The appellant relies on the case of State v. Myers, 99 Mo. 107, and other kindred cases of felony. In the Myers case the indictment was for murder, which was held to be

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bad for want of similar concluding words, but it was held sufficient without such words to make a good charge for manslaughter. State v. Stacy, 103 Mo. 11; State v. Sanders, 158 Mo. 610, were cases for murder and have no application to misdemeanor. If it is the law, as held in the Myers case, that the omission of such concluding words would constitute a good charge for manslaughter, we can see no good reason for holding that an indictment for a misdemeanor would not be sufficient without them.

It is further insisted that the nature and cause of the accusation are not stated in the indictment. In State v. Krueger, 134 Mo. 262, where the indictment was for a violation of section 374, Revised Statutes 1889, of the election law, a felony, the court held that an indictment in the language of the statute is sufficient only where all the facts which constitute the offense are set forth in the statute. But it was also held that where the statute described the whole offense it was only necessary to charge the crime in the words of the statute. In State v. Terry, 109 Mo. 601, the defendant was charged with the violation of section 3826, Revised Statutes 1889, relating to cheats, frauds, etc., the indictment following a form prescribed by the statute. The court held that the case being one for felony, the indictment though following the form prescribed was bad, as the defendant was not informed thereby of the nature of the charge against her and for that reason it was a violation of article 2, section 22 of the State Constitution.

But in State v. Clayton, 100 Mo. 516, it was held: "An assault may be charged in general terms, without specifying the manner in which it was made." In State v. Cox, 43 Mo. App. 328, it was held: "The law never required the same particularity in indictments for misdemeanors as it did in those for felonies," and that, "an information for a common assault, which charges the offense in general terms, without charging any particular intent, is sufficient." See also, State v. Chumley, 67 Mo. 41; State v. Phipps, 34 Mo. App. 400. We think

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the indictment not only formal but that under the authorities it sufficiently informed the defendant of the nature of the charge against him.

For the reasons given the cause is affirmed. All concur.

OPINION ON MOTION FOR REHEARING.

BROADDUS, J.—The ground for the motion is that this court overlooked the point made, that the trial court committed error in giving instruction number one, at the instance of the State, wherein the jury were authorized to convict the defendant, although the assault was not made for a lustful or immoral purpose as charged in the indictment. The defendant has cited us to many cases which upon examination we find have no application.

The indictment, notwithstanding it charged that the assault was made for a *lustful or immoral purpose,* only in effect charged a simple assault, and the words italicised had no effect to either enlarge or diminish the offense. They amounted to merely surplusage. Even in a case of a charge of murder with intent to rob, the court held, that that part of the indictment alleging that the offense was committed with such intent was surplusage. State v. Meyers, 99 Mo. 107.

Under all the authorities the offense charged was only an assault, whatever the intent may have been, and whereas it was competent to show by the facts defendant's intent, it was not necessary to allege it. The motion for rehearing is overruled. All concur.

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MARY J. KRONE, Respondent, v. THE SOUTHWEST MISSOURI ELECTRIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

Passenger Carriers: ALIGHTING PASSENGER: STARTING CAR: ACT OF STRANGER: ACTION. A passenger carrier is not liable for injuries caused solely by the acts of passengers not holding to it any relation of agency; so, where a car stopped and while plaintiff was alighting a stranger to the company pulled the bell cord causing the motorman to start the car whereby the passenger was injured, the carrier is not liable.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

REVERSED AND REMANDED.

STATEMENT BY BROADDUS, J.

This is a proceeding brought to September term, 1901, of the Jasper Circuit Court to recover damages for injuries to plaintiff in alighting from defendant's car (upon which she was a passenger) on August 16, 1901, at Main and Elizabeth streets in Carterville, Missouri.

The facts as shown by the evidence are as follows: That on the 16th day of August, 1901, there was a public gathering at Lakeside Park on line of defendant's road, some three miles east of Carterville, at which there was a large crowd in attendance. That plaintiff and one Mrs. Kirksey were together and boarded the car at Lakeside to go to Elizabeth street in Carterville; that the car was crowded with passengers, so much so that plaintiff, Mrs. Kirksey and a number of other passengers had to stand on the back platform. That plaintiff and Mrs. Kirksey paid their fares and notified the conductor that they wanted to get off at Elizabeth street

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in Carterville. That the car was stopped by the conductor at Elizabeth street; that Mrs. Kirksey got off and plaintiff was on the platform ready to alight when some one inside the car rung the starting bell and the car started up and the plaintiff fell or jumped off some twenty-five or thirty feet from where it was stopped.

Plaintiff testifies that she was in the act of alighting when the car started and she fell. The evidence on behalf of defendant shows the car is stopped at one ring of the bell and started by two rings of the bell: that plaintiff was on the platform ready to alight; that the conductor had his hand on her arm; that before plaintiff had started to step off, some one inside of the car without the knowledge or consent of the conductor, and not an employee of defendant, rung the starting bell and the car started; that the conductor had his hand on plaintiff's arm, and with the other reached for the bell cord to stop the car, at the same time telling the plaintiff to wait that he would stop the car. That the plaintiff pulled away from him and jumped or fell off about thirty feet from the starting point. The evidence also shows that plaintiff stated that some one had hold of her trying to hold her on, but she thought some one was trying to get her pocket book and she jumped off. It was also shown by the conductor that, sometimes, but not often, persons other than himself, without his knowledge or consent, gave the signal for the starting of the car.

The finding and judgment were for the plaintiff from which defendant appealed.

McReynolds & Halliburton for appellant.

(1) Instruction No. 8 asked by defendant should have been given, as the evidence showed that the car was stopped by the sounding of one bell and started by the sounding of two bells, that it was after dark, motorman on front end of car, conductor on rear end, and the car crowded. That some one inside the car rung the bell twice, thus giving the starting signal and starting the car. That whoever rung the starting bell was not an

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employee of defendant, and that it was done without the knowledge or consent of the conductor. (2) The railway company is not liable for such act of a third party. Elliott on Railroads, secs. 1639 and 1640, and cases cited; Patterson's Railway Accident Law, page 38; Booth on Street Railways, secs. 361 and 374; Bailey v. Railway, 152 Mo. 458; Spohn v. Railway, 87 Mo. 81; Fuchs v. St. Louis, 67 S. W. 617; Fuchs v. St. Louis, 133 Mo. 168, dissenting opinion; Sullivan v. Railway, 133 Mo. 1; Sawyer v. Railroad, 37 Mo. 240.

Redding & Owen for respondent.

(1) The only question raised by this record worthy of consideration is the one raised by instruction No. 8, asked by appellant and refused by the court. It could not have been given as it relieves defendant company from any liability as soon as it is shown the car was started by the ringing of the bell by some one not in the employ of the company. It does not require the company to use its efforts in stopping the car, and using all reasonable efforts to prevent the injury. Until this was done the company could not be excused from negligence. Being a carrier of passengers it would be held to the highest degree of care and caution. Smith v. Railway, 108 Mo. 243; Higgins v. Railroad, 36 Mo. 418; Coudy v. Railroad, 85 Mo. 79. (2) It was the duty of the employees of the defendant company to know who gave the signal and know that it was from the proper authority before starting the car. Demmitt v. Railway, 40 Mo. App. 654; Black's Law and Practice in Accident Cases, pages 33-4, sec. 29.

BROADDUS, J.—The defendant, among other instructions, some of which were given, asked the court to give the following which was refused, viz.:

"The court instructs the jury that if they believe from the evidence that the conductor stopped the car at Elizabeth street to let Mrs. Kirksey and plaintiff get off said car, and that Mrs. Kirksey got off and before plaintiff could get off some one, not an employee of the

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defendant, without the knowledge or authority of the conductor, rung the bell and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car and plaintiff fell off, then there was no negligence on the part of defendant and plaintiff can not recover in this case and their finding will be for defendant.''

We can not see upon what theory the court refused said instruction, for if it was true that some person other than the conductor and not in defendant's employ gave the signal which started the car while plaintiff was attempting to get off, causing her fall and injury, it was not the result of any negligence on the part of defendant but that of a careless or mischievous stranger over whom defendant had no control. Bailey v. Railway, 152 Mo. 449; Sullivan v. Railway, 133 Mo. 1. There must be absence of care and foresight in order to make the carrier liable for an injury to a passenger. Sawyer v. Railway, 37 Mo. 240; Elliott on Railroads, sec. 1639. Railroads are not to be held liable for injuries caused solely by the acts of persons who do not hold to them any relation of express or implied agency. Patterson's Railway Acc. Law, p. 38.

The defendant complains of the action of the court in giving plaintiff's second instruction, but we think it was proper enough when taken in connection with that of defendant's numbered seven which should have been given. We see no valid objection to the others given for the plaintiff.

For the error noted the cause is reversed and remanded. All concur.

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THE STATE OF MISSOURI ex rel. R. O. KERBY, Relator, Respondent, v. DISTRICT SCHOOL BOARD et al., Appellants.

Kansas City Court of Appeals, January 5, 1903.

1. **Schools:** DEFINITIONS: INCIDENTAL: CONTINGENT: SCHOOL FUNDS. In the school law the terms "incidental fund" and "contingent fund" are used interchangeably, and the term "school fund" is generic embracing the three distinct funds provided by the statute.

2. ———: CLAIMS AGAINST DISTRICT: SPECIFIC FUND: BREACH OF CONTRACT. No claim arises against a school district except under contract, and the averment that it arises from a breach of contract is insufficient to indicate out of what fund it should be paid.

3. ———: ———: ———: JUDGMENT. The fact that a claim may be reduced to a judgment does not make it payable out of the incidental fund. It should be shown that the contract on which the judgment was based related to matters payable out of such fund.

4. ———: ———: ———: ———: OTHER EXPENSES. It may be shown that a judgment is payable out of the incidental fund by showing that it was not for teacher's wages or for building, as the words "all other expenses" comprehend any claim not payable out of the other funds.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED AND REMANDED.

R. B. Middlebrook for appellants.

(1) This is a case where a statute enumerates particular classes of indebtedness which the district directors are authorized to incur as incidentals, followed by the general words, "all other expenses," and these general words will be limited in their meaning and restricted in their operation to indebtedness of like kind with those particularly specified. St. Louis v. Laughlin,

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49 Mo. 559; Dart v. Bagley, 110 Mo. 54; Miller v. Wagenhauser, 18 Mo. App. 14; State ex rel. v. Ennis, 79 Mo. App. 12; McCutcheon v. Railroad, 72 Mo. App. 275. (2) School districts are only quasi-public corporations. Their directors are compelled when drawing warrants and performing other similar acts, to follow the statute with great particularity. The courts have so held with practical unanimity, and the Legislature of Missouri seems to have determined with unusual scrutiny and precision that these officers should walk in a very straight and narrow path. 1 Dillon on Mun. Corp. (4 Ed.), secs. 25 and 26; Buchanan v. School District, 25 Mo. App. 85; Beach v. Leahy, 11 Kan. 299; Armstrong v. School Dist., 28 Mo. App. 169; Harris v. School Dist., 8 Foster (N. H.) 58; Secs. 9788, 9789 and 9790, R. S. 1899. (3) The supreme court of this State has expressly decided that it is permissible to ascertain the nature and character of the alleged indebtedness out of which the judgment arose—in determining whether a mandamus shall issue to compel the drawing of a warrant against the general fund of a county, to pay such judgment. In this case the plaintiff has neither alleged nor proved the existence of a general fund of any sort, but tries to treat the incidental fund as a general fund, when the statute provides otherwise. State ex rel. v. County Court, 68 Mo. 29; State ex rel. v. Trammel, 106 Mo. 510.

J. Allen Prewitt for respondent.

(1) Defendant's motion to quash alternative writ in the court below was properly overruled. State ex rel. v. Moss, 35 Mo. App. 441; Sec. 634, R. S. 1899. (2) Though improperly overruled they can not now complain as they did not stand on their motion to quash but undertook to make return. (3) Defendant's return was not sufficient. A return contemplates something more than a mere denial of the allegations of the alternative writ. 13 Ency. Pl. & Pr., pp. 716, 717, 718, 719, 720, 721, and citations in notes; State ex rel. v. Beyers, 41

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Mo. App. 503. (4) The return must show affirmatively, some valid reason for not complying with the command of the writ. State ex rel. v. Beyers, 41 Mo. App. 507; State ex rel. v. Williams, 96 Mo. 14; The Missouri statute clearly indicates this. Sections 4302 and 4303, R. S. 1899; State ex rel. v. County Court, 41 Mo. 545. (5) A final judgment in a cause merges the cause of action into the judgment. The recovery of a judgment extinguishes the cause of action. When this judgment was obtained the original cause of action was extinguished and the debt of defendants to plaintiff was thereafter a judgment. Tourville v. Railroad, 148 Mo. 614; Winham v. Kline, 77 Mo. App. 36; Rice v. McClure, 74 Mo. App. 379; Cowgill v. Robberson, 75 Mo. App. 412. Relator's claim, then, being a judgment, was payable out of the contingent fund. Sections 9788 and 9789, R. S. 1899.

SMITH, P. J.—This is a proceeding by mandamus commenced in the circuit court where the relator had judgment and the respondent appealed.

The alternative writ alleged that the relator on the 4th day of January, 1895, in the court of Samuel Robertson, justice of the peace, Jackson county, Missouri, a court of competent and duly conferred jurisdiction, obtained judgment *for breach of contract* for the sum of $100 together with the sum of $48.90 cost, against District No. 2, township 50, range 32, in Jackson county, Missouri, the same being a school district corporation organized under the laws of the State of Missouri; that said judgment was duly and regularly rendered and has not been appealed from, and that on the 15th day of January, 1895, execution was issued thereon according to law and was delivered to the proper officer for collection; that there was no property belonging to said district upon which said officer could levy under the said execution, and that the same was returned unsatisfied on the 4th day of April, 1895; that said judgment or any part thereof has never been paid but still remains due from said district to plaintiff, and that said

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judgment has been duly and regularly revived and kept in force and is now in full force and effect, and that an execution thereon will not, and can not avail anything for plaintiff for the reason that there are now no funds on which to levy the same; that the board of directors of said district consists of defendants J. D. Cusenberry, Jr., M. M. Hobson and M. L. Earhart; that the total amount now due on said judgment, including interest and costs, is $157.15; that it is now and has been since the rendition of said judgment the duty of said board of directors to draw a warrant to the treasurer of Jackson county, Missouri, directing the payment to relator of the full amount of said judgment, interest and costs out of any moneys belonging to such district for such purpose.

That there is now on hand in the custody of the county treasurer of Jackson county, belonging to said school district the following funds, to-wit: teachers' fund, $1,138.57; incidental fund, $381.44; building fund, $41.11, and sinking fund, $304.06, making in the aggregate the sum of $1,865.16, belonging to said school district, and from which it is now and has been the duty of said board of directors to pay the indebtedness of said district; that it is now and has been since the rendition of said judgment the duty of said board of directors to draw a warrant to the county treasurer against the incidental fund of said district for the payment of the judgment, interest and costs aforesaid; that the said board of directors since the rendition of the judgment aforesaid have utterly failed and refused to do their duty in the premises, and although they now have on hand in the proper fund belonging to said district and from which plaintiff's judgment can legally be paid, more than enough money to pay said judgment, interest and cost, yet the said board of directors have failed and do now refuse to pay the same, or to issue to relator a warrant to the county treasurer against the proper fund to cover the said judgment, interest and cost, as they are in duty bound to do; that the relator has no remedy by or through the ordinary process or proceedings at

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law, by which to procure the payment of said judgment, interest and cost.

The respondent filed a motion to quash on the double ground (1) that the judgment referred to in the writ was not pleaded with sufficient certainty to enable the court to ascertain the character of the obligation on which it (the judgment) was given, and (2) because it (the writ) did not state facts sufficient to constitute a cause of action, and which said motion was overruled and exceptions duly taken.

The question thus raised must be determined by reference to pertinent provisions of the statute. Section 9789 requires the school fund of each district to be divided into three distinct parts, to be specified as the "teachers' fund," "incidental fund" and "building fund." It further requires the county treasurer to open an account for each fund so specified and that all moneys received from state, county and township funds, and all moneys derived from taxation for teachers wages and all tuition fees and all back taxes be placed to the credit of the "teachers' fund;" that the money derived from taxation for incidental expenses be credited to the "incidental fund," and that all moneys derived from taxation for building purposes from the sale of a school site, schoolhouse or school furniture, fire insurance, from sale of bonds, from sinking fund and interest be placed to the credit of the "building fund." It also prohibits any county treasurer to honor any warrant unless drawn in proper form and upon the *appropriate fund, etc.*

Section 9790 requires that all moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected, and that the income from state, county and township funds be applied only to the payment of teachers' services. Section 9788 makes it the duty of the district clerk, upon the orders of the board of directors, to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for use of the school

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or material or labor in the erection of a schoolhouse—the warrant to be paid out of any moneys in the appropriate fund. This last section further provides that "*the species of indebtedness must be clearly stated and drawn on the appropriate fund,* that is to say, all moneys for teachers' wages on *the teachers' fund;* all moneys used in purchasing a site and the erection of buildings thereon and furnishing the same on the "building fund," and *all other expenses on the "contingent fund."*

It will be observed that the terms "incidental fund" and "contingent fund" are used interchangeably in these statutory provisions; and further that the term "school fund" is generic, embracing three distinct species.

Under the prohibitory mandates of the statute, a board of directors may not order, nor a county treasurer pay, a warrant unless it be specified therein whether or not the claim of indebtedness be either for services as teacher, material purchased for use of the school, or for labor in the erection of a schoolhouse. No claim against a school district payable out of any one of the specified funds can arise except out of a contract and therefore the presentation of a claim whether it be in the form of a judgment or otherwise, which shows no more than that it arose on a contract without specifying the subject-matter of such contract is too vague and indefinite to justify the board of directors in ordering a warrant to be drawn therefor on any specified fund. How can it (the board) in such case tell which is the appropriate fund on which to order the warrant? The claim may be for teachers' wages, for material purchased for use of the school, or services of a janitor, or for material, or labor in the erection of a schoolhouse, and yet arise out of "breach of contract." The board of directors is not at its peril required to guess the fund against which it is to order the warrant drawn for the amount of the claim. Neither of these specified funds can be applied to the payment of a claim which the statute requires to be paid out of one of the others. If the writ had stated the nature of the contract for the breach of

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which the judgment of the justice was given, then in all probability we would be able to determine whether or not it was the duty of the respondents to order a warrant to be drawn on any specific fund, but in the absence of such a statement we are unable to say they have neglected any particular duty.

We are unable to yield our assent to the relator's contention that since his claim is merged into a judgment and thereby becomes extinguished, it results as a legal consequence that the judgment must be satisfied out of the "incidental fund." Suppose the claim arose out of a breach of contract for the payment of teachers' wages, or for materials or services for the erection of a schoolhouse, can it be that such claim because merged into a judgment becomes payable out of the "incidental fund?" If this is so, what becomes of the statutory requirement that each indebtedness of the district must be paid out of the appropriate fund? Can an indebtedness for teachers' wages or for services in erecting a schoolhouse be made to become a charge against the "incidental fund" by converting it into a judgment? The bare statement of this proposition furnishes its own refutation.

It is further contended that the words "all other expenses," already quoted from section 9788, authorize the payment of the judgment out of the "incidental fund," since it does not affirmatively appear to be payable out of any specific fund. No doubt if it appeared that the claim was not payable out of either the teachers' fund or the building fund, it would then fall within the class payable out of the "incidental fund," but until this appears we can not see how it can be said to be appropriately paid out of any one fund more than another. The words "all other expenses" as used by the lawmaker, even as shown by the connection with others in which they stand related in this section, clearly intended to comprehend any claim not payable out of either of the other funds. It follows that, if one has a legal debt against a district which is neither payable out of the teachers' nor building fund, it must be payable out of

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the "incidental fund," and this can not be determined except by reference to the contract out of which it arose.

As it does not appear that the judgment should be satisfied out of a specific fund, or that it can not be paid out of either the teachers' or building fund, we can not discover that the respondents neglected any duty the performance of which can be enforced by mandamus. Accordingly we think it was error to overrule the motion to quash the alternative, and therefore the judgment will be reversed and cause remanded. All concur.

97	620
97	[3]557
98	[3]823
98	[3]408
98	[3]410
98	[1]546

ALBERT TURNEY, Respondent, v. FRANK P. EWINS, Appellant.

Kansas City Court of Appeals, January 5, 1903.

1. **Appellate Practice:** ABSTRACT: SUPPLEMENT. A supplemental abstract supplying the defects of the original one may be filed any time before the cause is submitted.

2. ———: ———: ———: MOTION FOR NEW TRIAL: RECORD. A supplemental abstract should be such that, taken with the original the record will be abstracted as contemplated by the statute and rules of court, and where the two taken together fail to show by a record entry the filing of a motion for new trial, they are insufficient.

3. ———: MOTION FOR NEW TRIAL: RECORD ENTRY: EXCEPTIONS. The recitation in the bill of exceptions that a motion for new trial was filed can not be noticed, nor can exceptions recited in the record proper.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

AFFIRMED.

Brown, Harding & Brown for respondent.

(1) This appeal is prosecuted under the short form provided by section 813, Revised Statutes 1899, and it was appellant's duty to file printed abstracts of

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the entire record; said record so filed does not show that any judgment was rendered on the verdict found by the jury. Sec. 813, R. S. 1899; Wilson v. Railway, 120 Mo. 60. (2) The record filed by appellant shows that motion for new trial was overruled on Saturday, December 7, 1901, and that the appeal was taken Monday, January 6, 1902; but does not show that the appeal was had at the same term of court that the motion for new trial was overruled. Sec. 808, R. S. 1899. (3) The record filed by appellant fails to show that the bill of exceptions in this case was ever filed. "Neither the indorsement of the clerk on the bill of exceptions 'filed' with day and date, nor the statement of the judge that it is signed, sealed and made a part of the record, nor both, will suffice. There must be a record entry that it was filed." Williams v. Williams, 26 Mo. App. 409; Finlay v. Gill, 80 Mo. App. 58; Sec. 728, R. S. 1899.

Ellis, Cook & Ellis for appellants.

(1) To save any possible question on the technicality sought to be raised on the sufficiency of the printed abstract, we make, serve and file an additional abstract showing that the foundations for this appeal were all laid with technical exactness. This, under the authority of Lane v. Railroad, 132 Mo. 4, we have the undoubted right to do.

ELLISON, J.—Plaintiff is an architect and brought this action to recover for services he claims to have rendered the defendant. The judgment in the trial court was for plaintiff.

Plaintiff has asked in his brief that the appeal be dismissed on account of defective abstract filed by defendant; in that it did not set out or recite that a judgment was rendered, or that a bill of exceptions was filed, or that time was extended for filing. Afterwards, defendant filed a supplemental abstract showing these things and plaintiff thereupon asks us to strike such last abstract from the files. Under the rulings of the

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Supreme Court an appellant may so supplement his defective abstract at any time before the cause is submitted. Lane v. Railroad, 132 Mo. 11; Ricketts v. Hart, 150 Mo. 67.

But such supplemental abstract, of course, must be such that when taken with the principal abstract the case will be abstracted as contemplated by the statute and the rules of court. In the present instance the original abstract was not only deficient in the matters above stated, but it is also deficient in that it is not made to appear that any motion for new trial was filed. The supplemental abstract fails to remedy this. There is a statement in the bill of exceptions that such motion was filed, but the filing of a motion for new trial is a matter of record proper and is not evidenced in the bill of exceptions. It has no place in the bill of exceptions. Hill v. Combs (not yet reported); Crossland v. Admire, 149 Mo. 650; Lawson v. Mills, 150 Mo. 428; Western Storage Company v. Glasner, 150 Mo. 426.

The action of the court in sustaining or overruling a motion for new trial is a matter of exception and the bill of exceptions properly shows, indeed must show, a motion for new trial and that it was acted on and exceptions saved. But the evidence of the filing of such motion, under the rulings aforesaid, must be had in the record proper. Matters of mere exception belong to the bill of exceptions and can not be proven by recitation in the record. Nichols v. Stevens, 123 Mo. 96, 119. On the other hand, matters of the record proper can not be proven by recitation in the bill of exceptions. Authorities supra.

We therefore have no motion for new trial which disposed of the matters of exception complained of, and not finding any error in the record we affirm the judgment. All concur.

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J. R. KELLEY, Respondent, v. LONDON GUARANTEE & ACCIDENT COMPANY, Appellant.

Kansas City Court of Appeals, January 5, 1903.

Indemnity Insurance: PARTNERSHIP: LIABILITY: INDIVIDUAL NEGLIGENCE. An insurer indemnifying a partnership against loss by accident to its employees from the negligence of the partnership, is only liable when the injury happens to the employee while engaged in the work of the partnership and by reason of the negligence of the partnership; and there is no liability for the individual negligence of a member of the partnership when not engaged in the partnership business.

Appeal from Jackson Circuit Court.—*Hon. John W. Henry,* Judge.

REVERSED.

Amos H. Kagy and *George Horn* for appellant.

(1) The first point we make is, we think, decisive of this case. Under the facts as disclosed by the record plaintiff's case must fall for a failure of proof. His petition does not state a cause of action, nor do the proofs make a case. He does not establish a legal demand. The action is based upon a contract of guaranty, or indemnity, running to a co-partnership composed of respondent, John R. Kelley, and his brother, William Kelley, the firm being denominated in the contract, the "assured." (2) The contention is that the firm is a legal entity and that the persons composing it are but its representatives in its business and their individuality is merged in the firm. And this is the view of the English courts. Pooley v. Dried, 5 Ch. Div. 458-476; Curtis v. Hollingshead, 2 Green, N. J. L. 403; Henry v. Berdner, 77 Ind. 361; Robertson v. Caswell, 39 Mich. 737; Cross v. Bank, 17 Kan. 336; For-

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syth v. Wood, 2 Wall. 486; Clark v. Laird, 60 Mo. App. 289; Fowler v. Williams, 62 Mo. 403. (3) It will not be contended that the defendant can be held liable until the "assured," has been damnified. Before any liability can arise under the contract the court must say that J. R. Kelley, as an individual, is the "assured," and this court can not under any known theory of law, construe this contract as an undertaking to indemnify J. R. Kelley. The claim against the guarantor is said to be *strictissimi juris* and that the written guaranty when free from ambiguity, is the sole criterion to fix the limits of his engagement. Brant on Suretyship, section 79, and cases cited; Blair v. Ins. Co., 10 Mo. 560; Bauer v. Cabanne, 105 Mo. 110; Braker v. Stone, 47 Mo. App. 530; Erath v. Allen, 55 Mo. App. 107; Adam v. Bank, 70 Mo. 524; Mitchell v. Railton, 45 Mo. App. 273.

Edwin S. McAnany and *Samuel Maher* for respondent.

(1) A partnership is not an entity, like a corporation. On the contrary it is a mere association of natural persons each of whom is liable separately as well as jointly, both on contracts and for torts, for the full amount of damages for which the firm has become liable; and one partner may be compelled to pay out of his individual property the entire liability of the firm. A firm can not be sued in its partnership name, at common law, in Missouri, nor in Kansas. (2) The court of common pleas of Wyandotte county, Kansas, granted a new trial to William Kelley, and rendered judgment against John R. in favor of Mr. Ford. Appellant claims this adjudicates that the firm was not liable to Mr. Ford. By no means. The granting of new trial to William did not adjudicate anything. It did not even dismiss William from the suit. It simply reopened the controversy between William and Ford, and gave William another chance to defend himself. But Mr. Ford had a judgment against John R. who was solvent

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and good. He collected it from John R., and that is all there is of this phase of the case. Tenny v. Forte, 95 Ill. 108; Dudley v. Love, 60 Mo. App. 420; Manufacturing Co. v. Perkins, 43 N. W. 1097; Linton v. Hurley, 14 Gray 191; Hyrne v. Erwin, 23 S. C. 226; 55 Am. Rep. 15. (3) The fact that the negligence of John R. caused the accident will not prevent him from recovering. One of the objects which the assured had in view in taking out the policy was to obtain indemnity for their own negligence. Such was the understanding of the company when it wrote this policy. Ins. Co. v. Sullivan, 39 Kan. 449.

ELLISON, J.—This action is based on a policy of indemnity insurance. The judgment in the trial court was for the plaintiff.

It appears that plaintiff and his brother William were partners in the cooperage business in the State of Kansas under the firm name of "J. R. Kelley & Brother." That in the prosecution of their business they employed a number of men, among them one Ford. Some hazard being connected with the business they took from defendant a policy of insurance, whereby defendant, in consideration of certain warranties and $112 premium, agreed "to indemnify J. R. Kelley and Brother" for the term of one year, "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any employee," etc., on account of the negligence of the assured. The policy provided that: "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a *judgment after trial of the issue.* No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against

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the company by the assured within thirty days after final judgment has been rendered and satisfied as above."

During the life of the policy Ford and J. R. Kelley were engaged in experimenting with a machine belonging to the firm, when Ford was injured. He thereafter sued the partnership in the State of Kansas charging liability to him on account of negligence which he set forth in his petition. This defendant was notified of the suit and took part in the trial which resulted in a judgment for Ford for $1,000 against both members of the partnership. A motion to set aside the verdict and grant a new trial was filed and sustained as to William Kelley, but overruled as to plaintiff herein, J. R. Kelley. The latter appealed to the Court of Appeals in Kansas where the judgment was affirmed. After the court set aside the verdict as to William and rendered judgment against J. R. alone, this defendant took no further part in the case, claiming that it was only liable for that which the partnership was liable for to the employee. Afterwards, J. R. Kelley paid the judgment, interest and costs to Ford and then brought the present action against defendant on the policy and obtained judgment as aforesaid.

Defendant seeks to avoid the judgment on the ground that the partnership was not adjudged liable for the accident to Ford, it being a part of defendant's contention that the court in Kansas by setting aside the verdict as to William Kelley and rendering judgment against J. R. alone, decided that the liability to Ford was not a partnership liability.

We are of the opinion that where the contract of indemnity is to indemnify for loss occasioned by accidents to employees of a partnership for negligence of the partnership, in order to render the insurer liable the accident must happen to the employee while engaged in work for the partnership and by reason of the negligence of the partnership; and that this must be made to appear by the judgment of the proper court. A partnership is a separate legal entity from the individual

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members composing it. Clark v. Laird, 60 Mo. App. 289; Curtis v. Hollingshead, 2 Green. 403; Henry v. Bergner, 77 Ind. 361; Robertson v. Caswell, 39 Mich. 737; Rope v. Herron, 15 Neb. 73; Cross v. Bank, 17 Kan. 336. And when one agrees to indemnify a partnership for damages resulting to it on account of its negligence, he does not become liable for loss to an individual for his individual negligence, as such, as distinguished from such negligence as would render the partnership liable as such. We are not unmindful that the negligent act of the individual member becomes the act of the partnership when committed in due prosecution of the partnership business. Dudley v. Love, 60 Mo. App. 420; Linton v. Hurley, 14 Gray 191. But in order to render liable an indemnitor like this defendant, it must be made to appear that the negligent act of the individual member was such an act as made it the act of the partnership.

In this case a court of competent jurisdiction refused to enter judgment against one of the two members of the partnership, but did enter it against the other as an individual. It does not appear what the reasons of the court were for such action; but it must have been on the ground that the negligent act of J. R. Kelley was not the act of the partnership and therefore not binding on William. However that may be, certainly the proceedings had in the case, taken as a whole, do not make it appear that the partnership was liable.

The result of the foregoing views is to reverse the judgment. All concur.

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WILLIS JOHNSON, Respondent, v. E. KAHN, Appellant.

St. Louis Court of Appeals, January 20, 1903.

1. **Justices' Courts:** STATEMENT, SUFFICIENCY OF. A statement before a justice of the peace, sufficiently specific to inform the opposite party of the foundation and character of the demand asserted is a full and sufficient compliance with the statutory provision.

2. ———: ———. The forerunning statement filed before a justice of the peace meets the requirements of the statutes: "Mexico, Mo., Sept. 17, 1901. E. Kahn, Dr. to Willis Johnson: Making sale of saloon stock, $92.50."

3. **Trial Court:** DUTY OF TESTIMONY: PROCEDURE; TRIAL. The provision of a trial court in a case before a jury is not to determine when proof has been made sufficient for a verdict, but is confined to instructing when testimony introduced tends to establish a fact in issue.

4. ———: ———: EXPERT TESTIMONY: JURY: COURT. The testimony of experts is admitted as a matter of necessity to be received and considered with great caution. The competency of such witnesses to testify is a legal question for the court to decide, but the weight to be given to expert testimony is to be determined by the jury.

Appeal from Audrain Circuit Court.—*Hon. E. M. Hughes,* Judge.

Reversed and remanded.

R. D. Rodgers for appellant.

(1) The statement of the facts constituting plaintiff's cause of action filed with the justice, and on which the case was tried in the circuit court, was a nullity. It did not advise the opposite party of the nature of the claim and was not sufficiently specific to bar another action. Secs. 3852 and 3853, R. S. 1899; Hill v. St. L. O. & S. Co., 90 Mo. 104; Rosenberg v. Boyd, 14 Mo.

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App. 429; St. Louis v. Babcock, 156 Mo. 148. (2) The testimony in this case showed that whatever the plaintiff did toward the sale of the saloon was done as an act of friendship or as agent for his cousin, Charles Johnson. The trial court should have given defendant's refused instructions Nos. 1, 2, and 4, submitting the case to the jury on that theory of fact. Warren v. Cram, 71 Mo. App. 638; Rosenthal v. Drake, 82 Mo. App. 358; Chapman v. Currie, 51 Mo. App. 40. (3) The testimony of the expert witnesses, Hopkins & Ricketts, as to the value of plaintiff's services sued for, was merely advisory, the weight of it being for the determination of the jury. Hence, the manifest error of giving the latter part of plaintiff's instruction No. 5. Cosgrove v. Leonard, 134 Mo. 419; Rose v. Spies, 44 Mo. 20. (4) The court erred in refusing to allow defendant to show what work the plaintiff did and how much time he spent in trying to sell the saloon to Charles Johnson. The amount of his compensation, if any, depended thereon. Mechem on Agency, sec. 605-606; Eggleson v. Boordman, 37 Mich. 14; Vilos v. Downer, 21 Vt. 419; Bank v. Combs, 7 Penn. St. 543; Stanton v. Embry, 93 U. S. 548.

REYBURN, J.—This action was commenced before a justice of the peace upon the following statement:

"Mexico, Mo., Sept. 17. 1901.

"E. Kahn, Dr.

"To Willis Johnson,

"Making sale of saloon stock, $92.50."

The case was appealed to the circuit court, where it was tried before a jury upon the same account. At no stage of the proceeding did defendant object to the sufficiency of the statement filed, except that at the close of the trial in the circuit court he asked an instruction that under the statement filed and the evidence introduced, plaintiff was not entitled to recover, which instruction was refused by the court. On trial in the circuit court the evidence showed that appellant was

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conducting a saloon in Centralia, Missouri, which he wished to sell; that he agreed to pay respondent a commission if he would find a purchaser, and on August 25, 1901, respondent went to appellant's home, and told him there was a man in town who wished to buy his saloon. Appellant accompanied by respondent went to his place of business, met Charles Johnson, showed him through his establishment, named the selling price and in the course of a few weeks sold the saloon to Charles Johnson.

The first question presented is the sufficiency of the statement or account constituting the plaintiff's cause of action originally filed with the justice, and on which the case was tried in the circuit court. Section 3852 of the statutes provides that no formal pleadings on the part of either plaintiff or defendant shall be required in a justice's court, but before any process shall be issued in any suit the plaintiff shall file with the justice the instrument sued on or a statement of the account, or of the facts constituting the cause of action upon which the suit is founded. Justice's courts are inferior tribunals, established to facilitate the summary disposal of petty controversies as economically and as expeditiously as possible. Formal pleadings therein are expressly dispensed with in order that suitors, if they see fit, without professional aid may prepare their own statements of causes of action, and conduct their own trials. A statement sufficiently specific to inform the opposite party of the foundation and character of the demand asserted, and to bar a subsequent action predicated upon the same facts, is a full and sufficient compliance with the statutory provision. The statement on which the present action was begun meets these requirements of the statute, and in substance, if not in identical form, has received approval and can no longer be assailed. Force v. Squier, 133 Mo. 306, and cases therein cited.

Proceeding to the consideration of the instructions under which this case was submitted to the jury, the plaintiff offered the testimony of experts to establish

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the value of his services in effecting the sale, who qualified by stating that they were engaged for many years in the real estate business and that the usual and reasonable commission of an agent for selling merchandise was five per cent on the first thousand dollars, and two and one-half per cent on the remainder of the purchase price, and upon this branch of the case the court instructed as follows:

"The jury is instructed that if you find for plaintiff you will return a verdict for such an amount as you believe from the evidence to be the usual and reasonable value of such services as plaintiff rendered, and you are further instructed that under the evidence in this case five per cent upon the first thousand dollars, and two and one-half per cent upon all sums over one thousand dollars, for which said saloon was sold, is the usual and reasonable value of such services."

The testimony of experts is admitted as a matter of necessity to be received and considered with caution. The competency of such witnesses to testify is a legal question for the court to decide, but the weight to be given to expert testimony is to be determined by the jury, and it is their province to weigh such testimony, which at best is merely advisory and not conclusive, and the right of the jury to reject intact the opinion of an expert is as broad and as well established as its right to repudiate or reject the testimony of an ordinary witness upon a question of fact. Apart from the element present in this case that the testimony regarding which this instruction was given is of that class denominated expert testimony, its peremptory character alone would be sufficient to condemn it. The jury are the sole judges of the weight of the evidence and of the credibility of witnesses and the acceptance by the jury of evidence as true and satisfactory is as essential, before proof can be said to have been completely made upon any controverted issue, as the presentation of the testimony itself. The province of a trial court in a case before a jury is not to determine when proof has been made sufficient for a verdict, but is confined to instructing when testi-

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mony introduced tends to establish a fact in issue. Fullerton v. Fordyce, 144 Mo. 519; Hoyberg v. Henske, 153 Mo. 63; Cosgrove v. Leonard, 134 Mo. 419; Gannon v. Gas Co., 145 Mo. 502.

For the error in thus instructing the jury the case is reversed and remanded for a new trial. *Bland, P. J.*, and *Goode, J.*, concur.

M. A. WILSON, Appellant, v. P. W. GRAY, Respondent.

St. Louis Court of Appeals, January 20, 1903.

Injunction: SALE UNDER DEED OF TRUST: PETITION. A petition alleging that plaintiff is the owner of certain real estate, that some years before a person named conveyed said land in trust, that afterward defendant trustee under such deed was advertising the land for sale in a certain newspaper in which such sales could be advertised under the law, states no cause of action for injunction to restrain such sale, it not appearing what was the character of the trust in the instrument, apparently unrecorded, or the nature of the advertisement or how such sale would affect plaintiff's title.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough,* Judge.

AFFIRMED.

J. D. Dalton for appellant.

John O. Marshall for respondent.

REYBURN, J.—On December 19, 1901, this action was begun by filing in the office of the clerk of the circuit court of the city of St. Louis, the following petition:

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"Said plaintiff for cause of action against said defendant says that he is the owner of the following described real estate situated in the city of St. Louis, Missouri, to-wit:"

(Omitting the description of the realty, the pleading proceeds:)

"And that on the 10th day of September, 1890, one Jennie Clark, single, executed to Robert Rutledge, trustee for one Claude Kilpatrick, her certain deed of trust, of that date, whereby she conveyed said lands to said Robert Rutledge in trust for the benefit of said Claude Kilpatrick; that afterward, the said defendant was duly appointed trustee under said deed of trust, and is now advertising said lands to be sold thereunder on the 30th day of December, 1901, in a daily newspaper called the St. Louis Real Estate Bulletin, and unless restrained by order of this court said defendant herein will on said day sell the same. That said newspaper is not such a newspaper as is contemplated by the law, in which advertisements for sales of lands under deed of trust can be made, for the reason that said paper is not a newspaper of general circulation, but its circulation is limited to the city and county of St. Louis, Missouri, and confined almost exclusively to real estate men, money loaners, contractors and builders.

"That a sale of said lands under said advertisement will cause a cloud upon the title of said plaintiff herein and cause a multiplicity of suits, and he is without legal remedy.

"Wherefore plaintiff prays that said defendant may be temporarily enjoined and restrained from selling said lands, or further advertising the same for sale in said St. Louis Real Estate Bulletin, and that upon a final hearing of said cause said order may be made perpetual, and that plaintiff have all further relief."

This petition was verified before a notary in manner following:

"M. A. Wilson, being first duly sworn, on her oath says that she is the plaintiff in the above entitled cause

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and that the matters stated in the foregoing petition are true.

"M. A. WILSON,
"By L. R. WILSON,
"Her attorney in fact."

On the 21st day of December following, plaintiff's application for a temporary injunction was submitted upon an agreed statement of facts between the plaintiff and defendant, as follows:

"It is hereby stipulated and agreed that the St. Lous Real Estate Bulletin is printed and published in the English language; that said publication claims to be, and is, a daily newspaper devoted to the real estate and kindred interests of the city of St. Louis; that it is issued every week day as a compendium of the wants, offerings, loans, delinquent tenants, new property on the market for sale, real estate transfers, building permits, with a special Saturday edition containing the rent and sale lists of the real estate agents classified and arranged for the convenience of the public; that said publication has a large circulation in the city of St. Louis and a limited circulation in the county of St. Louis, Missouri; that the price thereof is not nominal, but fixed and adhered to; that the circulation is not confined to any particular trade, but it circulates generally among real estate men, money loaners, contractors, builders, lawyers, merchants, manufacturers and other property-holders; that of the Saturday edition of said publication, a large number of copies is for the guidance and convenience of the public seeking desirable rental property, placed for free distribution in each of the drugstores in the city of St. Louis. It contains daily a number of items of news of special interest to those interested in real estate and kindred subjects. It also contains daily a list of conveyances of real estate, deeds of trust filed, building permits, landlord summons suits, and special notes of doings of the St. Louis Real Estate Exchange. It also contains each day a large number of classified advertisements under the head of 'Business Directory.'

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It is also agreed that the copies hereto attached are fair specimens of said publication."

On the same day the plaintiff's application for a temporary injunction against the defendant was denied by the court, and at the ensuing April term the cause was submitted upon the pleadings and above agreed statement, and the court dismissed plaintiff's bill. If any specimens of the paper in question, in which the advertisement was being inserted, were submitted to the trial court, as contemplated or called for by the agreed statement, they were not incorporated in the record in this court.

In the briefs filed, opposing counsel treat the question whether the publication in question was a newspaper within the meaning of that section of the statute controlling mortgages or deeds of trust with power of sale, as the decisive issue, but under the view taken by this court, it is unnecessary to consider this proposition for a disposition of this case. Neither the petition nor the agreed statement of facts, which was the only proof or substitute for legal proof submitted to establish the allegations of the petition, show any right of action, or establish any cause of action in plaintiff.

The petition is vitally defective and signally fails to embrace allegations essential to show any right of action in plaintiff. It does not appear what was the character of the trust in the trust instrument, apparently unrecorded, nor does it appear what was the nature of the alleged advertisement, nor is it alleged how such advertisement, if matured by a sale, would affect plaintiff's title.

Defendant filed, on February 6, 1902, by way of answer, a general denial, but no evidence or proof of ownership of the realty in question, nor of the advertisement, nor in support of any other allegations, appears to have been offered, except as set forth in the incomplete stipulation or agreed statement of facts. If the sole issue controverted was the inquiry whether the publication named was a newspaper, by the recitals of the agreed statement the parties hereto have answered this

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as between themselves for the purposes of this proceeding, and so nothing remained to be tried, and the judgment of the lower court in dismissing the bill was correct and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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BERTIE McDERMOTT, Respondent, v. MODERN WOODMEN OF AMERICA, a Corporation, Appellant.

St. Louis Court of Appeals, January 20, 1903.

1. **Foreign Fraternal Benefit Societies:** STATUTORY CONSTRUCTION. A foreign fraternal beneficiary association, such as the Modern Woodmen of America, which has complied with the laws of Missouri relating to fraternal beneficiary associations, is subject to the burdens and entitled to the immunities pertaining to those societies in this State, their status and responsibilities being prescribed by a particular article of the statutes (article 2, chapter 12) and not by the general insurance statutes (section 1410, Revised Statutes 1899).

2. ———: ———. Under the provisions of sections 1409 and 1410, Revised Statutes 1899, it was intended not only to permit foreign associations to do business in this State if they comply with the statutes, but to do it on the same terms domestic corporations may.

4. **Insurance:** FRATERNAL BENEFIT SOCIETIES: STATUTORY CONSTRUCTION. The proviso that no misrepresentation made in obtaining or securing a policy of insurance on the life of a citizen of this State shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to a loss on the policy (Revised Statutes 1899, section 7840), is not contained in the article on fraternal beneficial societies, but in the one on ordinary insurance and is not binding on fraternal societies.

4. ———: ———: ———: ———. And it is sufficient to avoid the policy or certificate counted on in the case at bar, that any false statement or representation, whether material to the risk or not, was made by the deceased to procure it, and inasmuch as all the answers to the questions propounded to him were agreed to be warranties, if any of them were false, the contract is annulled whether the false statement was fraudulently or innocently made.

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5. ———: ———: ———: REPRESENTATIONS IN APPLICATION FOR INSURANCE: WARRANTIES. The difference between the legal effect of a mere representation and a warranty is, that if the representation turns out to be substantially true as to facts material to the risk, the policy of insurance which it induced will be upheld, although the representation was false in unessential particulars; but a warranty must be strictly true, as it defines the limits of the obligations assumed by the insurer and if it is false in any part, whether that part affects the risk or not, there can be no recovery on the contract.

6. ———: ———: ———: ———: ———: CERTIFICATE OF INSURANCE: APPLICATION FOR INSURANCE. In the case at bar, both the certificate sued on and M's application declared in strong and reiterated language that the answers in the application were warranted to be literally and exactly true and that their literal and exact truth was a condition precedent to any binding contract between M. and the company. *Held*, that the answers of the applicant were made warranties by the agreement of the parties without regard to their materiality, and the question for decision is, was any of them shown to be false in such sense as to render the contract void.

7. ———: ———: ———: ———: ———. In the case at bar, the applicant answered the interrogatory as to whether he was of sound mental and physical health and free from disease or injury at the date of the application for insurance, in the affirmative, and it is asserted by the defendant that this answer was false, and the trial court instructed the jury that the meaning of the inquiry was whether or not the applicant have any grave, important or serious disease, whether he had a state of health free from disease or ailment which affected his general healthfulness and the soundness of his system, and that the inquiry did not embrace a temporary ailment or indisposition having no tendency to undermine or weaken the constitution: *Held*, that although the applicant had some slight temporary ailment, he could say with literal and exact truth that he was free from disease within the meaning of the interrogatories addressed to him.

8. ———: ———: ———: ———: ———. Where, as in the case at bar, it is conceded that the applicant for insurance, in a fraternal beneficiary society, stated that he had not been visited by a doctor and had not been treated for an ailment for seven years, when in truth and in fact he had been visited and treated by a physician within a month before making application for insurance, and that said applicant misstates the fact, and that the answer was a warranty, this will defeat an action by the beneficiary for insurance on the policy.

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Appeal from Clark Circuit Court.—*Hon. Edwin R. McKee,* Judge.

Reversed.

J. G. Johnson and *W. T. Rutherford* for appellant.

(1) Appellant is a fraternal benefit society, as defined by the laws of Missouri, governing such societies. Sec. 1408, R. S. 1899; Brassfield v. M. W. of A., 88 Mo. App. 208. (2) Any society, corporation or organization coming within the provisions of section 1408, Revised Statutes 1899, and doing business in this State under article 2, chapter 12, Revised Statutes 1899, is not subject to the general insurance laws of Missouri which include sections 7890 and 7891, and appellant issued its benefit certificate under said article and chapter. Whitmore v. Sup. Lodge, 100 Mo. 46; Laws of Missouri, 1897, p. 132; Hastings v. Littledale, 150 Mass. 100; Bacon on Benefit Societies, par. 50; Hanford v. Mass. Ben. Ass'n, 122 Mo. 50; Elliott v. Life Ins. Co., 163 Mo. 132, and cases cited. (3) Where, as in the case at bar, the insured in his application warrants the statement therein to be true, and agrees that any untrue statement or any concealment of facts may forfeit all rights under the contract, and the insured as part consideration of the contract agrees that the statements made in the application are the basis of the contract of insurance, and are warranted to be true in all respects, all the representations are warranties, and any representation, whether material or immaterial, will avoid the policy. Joyce on Ins., secs. 1842, 1944, 1970; Baumgart v. M. W. of A., 55 N. W. 713; Whitmore v. Sup. Lodge, 100 Mo. 47; Leinz v. Ins. Co., 8 Mo. App. 364. (4) Where there is no controversy as to the facts, the verdict of the jury should be directed by the court. Hoster v. Lange, 80 Mo. App. 234; Bank v. Bank, 151 Mo. 320.

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Charles Hiller, Whitesides & Yant and *James C. Davis* for respondent.

(1) Rules as to the construction of contracts of insurance: American Surety Co. v. Pauly, 170 U. S. 133, 18 S. C. R. 552; Mutual Reserve Ass'n v. Farmer, 47 S. W. 850; Provident Life Soc. v. Reutlinger, 25 S. W. 836; Association v. Gillespie, 110 Pa. St. 84, 1 Atl. 340; Wilkinson v. Ins. Co., 30 Iowa 119; Ins. Co., v. Wilkinson, 13 Wall. 222. (2) A provision in a contract requiring an impossibility will not be enforced. Eggleston v. Ins. Co., 65 Iowa 315; Bumstead v. Ins. Co., 12 N. Y. 92; Ins. Co. v. Boykin, 12 Wall. 436; Peele v. Provident Society, 44 N. E. 663. (3) In construing the question and answer in the application, "Have you within the last seven years been treated by or consulted any physician, or physicians, in regard to personal ailment?" the true construction of the term, "personal ailment," as used in the application for insurance, does not refer to a trifling, temporary disorder, not serious in its nature. Brown v. Ins. Co., 65 Mich. 306, 32 N. W. 610; Hann v. National Union, 97 Mich. 513, 56 N. W. 834; Plumb v. Life Ins. Co., 65 N. W. 612; Billings v. Life Ins. Co., 41 Atl. 517.

GOODE, J.—On March 16, 1901, the appellant, the Modern Woodmen of America, which is a fraternal insurance company (or this case was tried on that theory) organized under the laws of the State of Illinois, issued a benefit certificate to Robert L. McDermott, in favor of the respondent, Bertie McDermott, for the sum of two thousand dollars. The certificate or policy was issued in Clark county, Missouri, the appellant company having complied with the laws of this State and being entitled to do business in it.

McDermott died in the city of St. Louis October 18, 1901, after a surgical operation intended to relieve him from a malignant tumor on his neck; and the defendant company having refused to pay the amount

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called for in the benefit certificate, the present action was instituted to recover it.

The defense is based on alleged false answers to certain questions propounded to the deceased in his application for insurance, which answers are asserted to have been warranties of the truth of the matters stated in them.

Those questions and answers were as follows:

"14. Have you within the last seven years been treated by or consulted a physician or physicians in regard to personal ailment? No. If so, give dates, ailment, and physician or physicians name and address.

"15. Are you now of sound mind and health and free from disease and injury, of good moral character and exemplary habits? Yes.

"16. Have you ever had any local disease, personal injury or serious illness? No."

No showing was made that the answer to question sixteen was false other than was included in the proof relating to the answer to question fifteen. It was proven that on the ninth day of February, prior to the issuance of the certificate in March, McDermott had consulted Dr. Bridges of the town of Kahoka, complaining of pain in the stomach and indigestion, and that said physician gave him a prescription. On the twenty-third day of February, McDermott made the same complaints and was given the same prescription, which was one commonly administered for indigestion. He afterwards called in Dr. Bridges on the fifteenth day of April, who found him at his home suffering from liver complaint and Dr. Bridges treated him from that time until a short time before he died. There was testimony tending to prove he had cancer of the stomach, from which developed the malignant tumor on his neck under the point of the jaw, and that he died from exhaustion, partly caused by his disease and partly by the surgical operation. There was also testimony that McDermott looked healthy when he took the insurance, was able to do hard and continuous labor and was regarded by his acquaintances as a healthy man; that the appellant's physician examined

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him and recommended him as a first-class risk. It was also testified by a physician that no one could say whether or not the disease that killed him was present in an incipient state when he was prescribed for in February.

Appellant contends the foregoing proof showed conclusively the falsity of the answers made by McDermott to questions fourteen and fifteen in his application; while the respondent insists that the testimony showed McDermott's illness, when he consulted Dr. Bridges in February before taking the insurance in March, was of so trifling a nature as not to constitute a personal ailment, local disease or serious illness within the meaning of the application, or, at all events, it was for the jury to say whether he did or did not answer falsely and whether there had been a breach of warranty, if the answers in the application amounted to warranties.

The trial court took the respondent's view of the matter and gave, at the latter's request, the following instructions over the objection of appellant.

"1. In construing the proposition as to whether or not the plaintiff's deceased husband had been treated by or consulted a physician, as contemplated in the application for the contract of insurance sued on, you are instructed that merely calling into a doctor's office for medicine to relieve a temporary indisposition, not serious in its nature, or consulting concerning some indisposition of a trivial nature, would not be being treated by or consulting a physician as contemplated in the said application.

"2. One of the defenses relied upon by defendant in this case is that the applicant falsely answered the following question in the application upon which the contract of insurance sued on was issued, to-wit: 'Are you now of sound body, mind and health, free from disease or injury?' This question was answered 'Yes.' The jury are instructed that sound body, mind and health and free from disease or injury means that at the

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time of the application the insured had no grave, important or serious disease. It means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system generally, and not a mere indisposition which does not tend to weaken or undermine the constitution of the insured. A mere temporary ailment or indisposition which does not tend to weaken or undermine the constitution at the time of making the application would not render a policy void.

"3. The jury are instructed that, practically speaking, a disease must have some time of commencement. On one day the victim may be free from disease, and on the next day the disease may be said to have commenced. There may be bacilli or premonitory symptoms of a disease, yet it may not have progressed so far as to be actually termed a disease. So in this case, in the months of February and March, prior to the taking of the application and delivery of the policy in this case, there may have been premonitory symptoms of the disease that would not arrive at the importance of the disease itself; and you are therefore instructed that the mere premonitory symptoms could not in the first instance be recognized as the existence of a specific disease."

This instruction asked by appellant was refused:

"a. In the application made by McDermott (which is undisputed) for the benefit certificate sued on, the said McDermott was asked in said application the following direct and specific question: 'Have you within the last seven years been treated by or consulted any physician or physicians in regard to personal ailment?' and in answer to said question said McDermott answered 'No.' And if the jury believe from the greater weight of the evidence in the cause that said answer was not full, complete and literally true, then the plaintiff can not recover in this case, and it is immaterial as to whether or not such ailment was slight or serious or even merely temporary."

These instructions were given at appellant's request:

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"1. The court instructs the jury that in this case you will look for the contract to be enforced between plaintiff and defendant in the benefit certificate, which is undisputed, and in the application therefor which is undisputed, and in such of defendant's by-laws as have been read in evidence, and you are to give all of these elements of the contract equal consideration in determining the contract sued on in this case.

"2. In the application of Robert L. McDermott for the benefit certificate sued on you will find numerous statements and answers to questions as to his present and past health; you are instructed that said application and contract is what is known in law as a strict warranty and that each and all of the answers and statements contained in said application must have been full, complete and literally true before the plaintiff can recover in this action.

"3. In the application made by McDermott (which is undisputed) for the benefit certificate sued on, the said McDermott was asked in said application the following direct and specific question: 'Are you now of sound body, mind and health and free from disease and injury?' and in answer to said question McDermott said 'Yes.' Now if the jury believe from the greater weight of the evidence in the cause that said answer was not full, complete and literally true, or that at the time of making said application McDermott was suffering from disease, then the plaintiff can not recover in this case, and your verdict will be for the defendant; and it is immaterial that at the time of making the application Robert McDermott knew or did not know that he had a disease, if it be a fact that he had a disease at said time."

The principal point in the case must be determined in view of certain provisions contained in the certificate and in the application, and also in the by-laws, but the latter need not be recited.

The benefit certificate on which the action is based contains, among other things, the following clauses:

"1. That the application for membership in this

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society made by the said member, a copy of which is hereto attached and made part hereof, together with the report of the medical examiner, which is on file in the office of the head clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as is fully set forth in this benefit certificate.

"2. That if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to the said member, his beneficiary or beneficiaries, be absolutely null and void."

The application, immediately following the questions propounded to McDermott for insurance and his answers thereto, contained the following stipulations:

"APPLICANTS WILL PLEASE NOTE THIS CLAUSE.

"I have verified each of the foregoing answers and statements from 1 to 28, both inclusive, adopted them as my own, whether written by me or not, and declare and warrant that they are full, complete and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I

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shall fail to comply with and conform to any and all of the laws of said Modern Woodmen of America, whether now in force or hereafter adopted, that my benefit certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the head physician and I shall be regularly adopted in accordance with the ritual of this society and shall make the payments as required by its by-laws at adoption; and any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the by-laws of the society. And I hereby expressly waive for myself and beneficiaries the privileges or benefits of any and all laws which are now or may hereafter be in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any State, now in force or that may hereafter be enacted, that would, in the absence of this agreement, modify or conflict with my contract with this society, or cause it to be construed in anyway contrary to its express language.

"ROBERT L. McDERMOTT, Applicant.

"Date, Feb. 27, 1901."

A verdict was rendered for the respondent for the amount of the certificate and an appeal was taken by the society.

1. As the appellant company had complied with the laws of the State of Missouri relating to fraternal beneficiary associations, it is subject to the burdens and entitled to the immunities pertaining to those societies in this State, their status and responsibilities being prescribed by a particular article of the statutes (art. 11, chap. 12) and not by the general insurance statutes. R. S. 1899, sec. 1410.

It was decided by the Supreme Court in Kern v. Legion of Honor, 167 Mo. 471, that only domestic fra-

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ternal societies enjoy exemption from the general insurance laws subsequent to the adoption of the Revised Statutes of 1889, because the act of the General Assembly of March, 1881, which extended the exemption to foreign societies, was left out of that revision. That opinion, however, related to a contract for fraternal insurance made and performed by the insured in 1895, and had no occasion to consider the effect of the Act of March 16, 1897, permitting associations organized under the laws of other States to be admitted to do business in this State on terms prescribed by said act. By that act it was intended not only to permit foreign associations to do business in this State if they comply with the statutes, but to do it on the same terms domestic associations may; and as the act was carried into the last revision of the statutes, it is now a part of the law of the State. R. S. 1899, secs. 1409, 1410.

The proviso that no misrepresentation made in obtaining or securing a policy of insurance on the life of a citizen of this State shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to a loss on the policy (R. S. 1899, sec. 7840) is not contained in the article on fraternal beneficial societies, but in the one on ordinary insurance and is not binding on fraternal societies. Whitmore v. Legion of Honor, 100 Mo. 36; Hanford v. Benefit Ass'n, 122 Mo. 50; Hayne v. Knight Templars, etc., 139 Mo. 416; Jacobs v. Life Ins. Co., 142 Mo. 49. It is sufficient, therefore, to avoid the policy or certificate counted on in this case, that any false statement or representation, whether material to the risk or not, was made by the deceased to procure it; and inasmuch as all the answers to the questions propounded to him were agreed to be warranties, if any of them was false, the contract is annulled, whether the false statement was fraudulently or innocently made. In other words as the answers were warranties and not representations, it need not be shown that McDermott answered falsely from a corrupt motive in order to avoid the certificate.

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It is only necessary to show the answers were in fact false.

The essential difference between a representation and a warranty in a contract of insurance, when there is no statute touching the matter, is that a representation is a statement by the applicant to the insurer of information which the latter may desire in order to determine whether the risk will be written; the statement being no part of the contract but only an inducement to make it. But a warranty becomes a part of the contract itself. Blumer v. Insurance Co., 45 Wis. 622; Glendale Woolen Co. v. Ins. Co., 21 Conn. 19; Campbell v. Life Ins. Co., 98 Mass. 389. That is the difference between the two things, and the difference between their legal effect is that if a representation turns out to be substantially true as to facts material to the risk, the policy which it induced will be upheld, although the representation was false in unessential particulars. But a warranty must be strictly true, as it defines the limits of the obligation assumed by the insurer, and if it is false in any part, whether that part affects the risk or not, there can be no recovery on the contract. Aloe v. Life Ins. Co., 147 Mo. 561.

Contracts of insurance have given the courts more trouble, perhaps, than any other class of agreements, for the reason that insurance companies dictate the terms of their policies and have always been inclined to fill them with various conditions and provisos, which, whether material to the risk or not, are insisted on to defeat liability if a loss occurs.

To prevent companies from evading payment because of the breach of some warranty when the breach has nothing to do with the loss, courts have uniformly construed statements by the assured to be representations instead of warranties when the contract permitted such a construction; and in many States, including this one, legislation has been enacted providing that no misrepresentation shall constitute a defense unless the fact misrepresented contributed to the loss.

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Our Legislature has seen fit, however, to exempt fraternal societies from the operation of this statute and to leave them still free to avoid their policies for breaches of immaterial warranties; so that the present case must be decided with that legislative policy in mind, and no strained interpretation of the contract adopted in order to give the beneficiary a better standing than the statutes do.

2. Both the certificate sued on and McDermott's application declared in strong and reiterated language that the answers in the application were warranted to be literally and exactly true and that their literal and exact truth was a condition precedent to any binding contract between McDermott and the company. The answers were made warranties by the agreement of the parties without regard to their materiality, and the question for decision is, was any of them shown to be false in such sense as to render the contract void; or, rather, were the instructions to the jury as to how they were to decide, whether they were true or false, sound law?

(a) McDermott answered the interrogatory whether he was of sound mental and physical health and free from disease or injury at the date of the application, in the affirmative, and it is asserted this answer was false. As to that issue of fact the most that can be said in favor of the company is that there was evidence tending to show McDermott's health was then unsound. But the evidence having that tendency was not uncontradicted, for there was much testimony to show his health was good and that he was free from disease.

The trial court instructed the jury that the meaning of the inquiry was whether McDermott had any grave, important or serious disease; whether he had a state of health free from disease or ailment which affected his general healthfulness and the soundness of his system; that the inquiry did not embrace a temporary ailment or indisposition having no tendency to undermine or weaken the constitution.

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Warranties must be strictly true according to the intention of the parties; but what was intended and understood to be warranted is ascertained by the same rules of interpretation applied to other contracts, and all reasonable doubts about the compass of a warranty will be resolved in favor of the insured. Association v. Gillespie, 110 Penn. St. 89.

To ascertain whether the above mentioned instruction was correct, we must bear in mind the purpose of the interrogatory, which was to learn whether or not the appellant was afflicted with any malady or symptoms likely to shorten life. The insurance company could have had no object in learning McDermott had a transient or slight indisposition, such as a headache or cold, and could have derived no benefit from such information. It was endeavoring to find out the state of his constitution and general health in order to calculate his probable longevity and thereby settle whether he was a good risk. The natural conclusion from the question itself is, that the information sought to be elicited was of that character; and such was the purpose of the other questions, of which there were a large number. The interpretation usually given by the courts to similar questions in applications for insurance is like the one suggested.

In Cushman v. Life Ins. Co., 70 N. Y. 72, the applicant was asked if he had had any disease of the liver and answered that he had not. It was, however, shown he had had congestion of the liver in a slight form during five or six days on two occasions before the policy was taken out and this proof was insisted on to annul the contract. In dealing with the contention the Supreme Court of New York said:

"In construing contracts words must have the sense in which the parties used them, and to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application, the defendant was seeking for information bearing upon the risk which it was to take, the

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probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life. Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So, most, if not all persons will have at times congestion of the liver, causing slight functional derangement and temporary illness, and yet in the contemplation of parties entering into contracts of life insurance, and having regard to general health and the continuance of life, it may safely be said that in such cases there is no disease of the liver. In construing a policy of life insurance it must be generally true that, before any temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health and the continuance of life or such as according to common understanding would be called a disease; and such has been the opinion of text-writers."

The doctrine and the language of this New York case are adopted as a correct enunciation of the general rule by a commentator on the subject. 1 Bacon on Benefit Ass'ns (2 Ed.), sec. 234.

A leading case on the proposition is Moulor v. Life Ins. Co., 111 U. S. 335, in which the insured was asked if he had had certain diseases which he denied ever having, and there was evidence tending to show he had been afflicted with some of the diseases. It was ruled that if he was in apparently sound health and answered in good faith, the answers were true according to the intention of the questions and that the policy was not void, although he then had some of the diseases inquired about in an inappreciable form without being conscious of the fact. To the same effect are Goucher v. Traveling Men's Ass'n, 20 Fed. 596; Manhattan Ins. Co. v. Carter, 82 Fed. 986; Conn. Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 257.

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In Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, it was decided that a policy was not forfeited because the insured stated that he had not been sick nor afflicted with any disease, though in truth he had had a cold. The opinion said: "These terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness."

In Goucher v. Traveling Men's Ass'n, supra, it is said: "The term 'good health' as here used does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities or from all tendencies to disease. It can not mean that a man has not in him the seeds of some disorder. As has been remarked by some of the law-writers, such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term 'good health' as here used is to be considered in its ordinary sense and means that 'the applicant was free from an apparent sensible disease or symptoms of disease by which health could be tested.' Slight, unfrequent and transient disturbances not usually ending in serious consequences may be consistent with good health as that term was here employed."

We perceive from the third instruction given at the instance of appellant that the trial court held that McDermott's answer to the question whether he was of sound body, mind and health and free from disease and injury must have been literally true or there could be no recovery on the certificate; while we perceive from the second instruction given at the instance of respondent that the court also held a temporary indisposition not tending to weaken the constitution, although present at the time the application was signed, did not falsify the answer. In other words, that although the applicant had some slight temporary ailment, he could say with literal and exact truth he was free from disease within the meaning of the interrogatories addressed to him;

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and we think that, according to the cases on the subject, those charges were accurate.

(b) We will next consider the effect of the negative answer to the inquiry whether McDermott had been treated by or consulted a physician in regard to any personal ailment within seven years preceding his application for insurance, in connection with the conceded facts that he had consulted a physician on two occasions in the previous month and the physician had prescribed for him for what was thought to be a fit of indigestion. As to the effect of those facts on the contract, the jury were instructed that merely calling at a doctor's office for medicine to relieve a temporary indisposition, not serious in its nature, or consulting a doctor about some trivial indisposition, did not fall within the purview of the question nor constitute a breach of the warranty. An instruction was refused to the effect that if the jury believed McDermott's answer to that question was not full, complete and literally true, then the plaintiff could not recover and it was immaterial whether the ailment for which he consulted the physician was slight or serious or merely temporary. The object of this question was very different from the object of the one relating to McDermott's state of health and the information sought to be elicited by it was not so much the diseases he might have been treated for, as the names and addresses of physicians whom he had consulted or who had prescribed for him, with the purpose of making further investigation as to the condition of his health.

The question demanded the names of such physicians, whether they had been consulted in regard to a serious or a trivial complaint, and the name of any physician McDermott had consulted within seven years should have been given, even though the ailment for which he sought relief was slight.

In Aloe v. Life Ass'n, 147 Mo. 561, the Supreme Court said:

"It was shown by several physicians who testified on the part of defendant on the trial that the statements

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made by Aloe in his application for insurance that he had not consulted or been treated by a physician in thirty years, were untrue. The object of this inquiry suggests itself. If he had not consulted or been treated by a physician during that time, that was the end of it. But if he had consulted a physician or been treated by one during that time, the defendant had the right to know it, by whom and what for, so that it might ascertain the particulars from him. U. B. Mutual Aid Society v. O'Hara, 120 Pa. St. 256.

"It has been repeatedly held that such questions called for important information which the assured was bound to give truthfully." And the plaintiff was nonsuited for that and other false answers made by the deceased.

The argument of the respondent in this connection is that because the words "personal ailment" were used, the question must be interpreted to mean a physician was consulted for some grave illness or complaint, thus erroneously applying to this interrogatory the same rule of interpretation applied to the one above discussed. The natural significance of the words "personal ailment" is not serious illness but an ailment affecting McDermott himself, and of the question embracing those words, whether McDermott had consulted a physician for some ailment of his own; not one troubling a member of his family or other person. That the purpose of the question was not to find out whether he had any serious illness within seven years, but to get the names of any physicians whom he had visited professionally, is further shown by the circumstance that the application contained specific inquiries as to whether McDermott had had any grave diseases, such as rheumatism, smallpox, rupture, abscess, apoplexy, pneumonia—almost the entire list of ordinary diseases was covered by the questions propounded. We think, therefore, a clear breach of warranty was committed by McDermott's answering that he had not consulted or been treated by a physician within seven years, when in fact he had both consulted and been treated by one within a few weeks of the time

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he made the answer; and this breach existed none the less if McDermott was in truth only slightly ill at the time. He consulted a physician and the latter gave him a prescription for a personal ailment, as that word is defined and commonly understood.

"Ailment" is defined in the Century Dictionary as "Disease; indisposition; morbid affection of the body; not ordinarily applied to acute diseases;" in Webster's Unabridged Dictionary, as "Indisposition; serious affection of the body; not ordinarily applied to acute diseases;" and by Worcester as "Pain; disease; illness."

It is impossible to say, considering the fact that McDermott died within a few months of cancer of the stomach, or at least of a malignant tumor thought to be an offshoot of cancer of the stomach, that the ailment he was treated for in February was not the beginning of his fatal malady—expert physicians were unable to say whether it was or not; which shows the importance of a strictly true answer to the interrogatory. Similar warranties were held to have been broken in many cases by answers like McDermott's; or even by answers which purported to state the names of the physicians who had attended the applicant but by mistake or design failed to do so; and while the decisions are not altogether uniform, the great preponderance of authority is in favor of that construction of insurance agreements.

In Life Ins. Co. v. McTague, supra, though a representation that the insured had not "been sick or affected with any disease" during the period the policy sought to be renewed was suspended was held not to be falsified by the fact that he had a cold, the statement that he had not, during said period "consulted or been prescribed for by a physician" was held to be falsified by his being treated by a physician for the cold. The court said:

"That representation did not aver a condition of health or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consulta-

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tion and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application that, in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question, for, as we have seen, its truth is warranted. Its falsity appears from the fact found."

In Caruthers v. Mut. Life Ins. Co., 108 Fed. 487, the inquiry as to whether the insured had suffered from a serious illness was ruled to have been truly answered, though the insured had had chills and fever, as the trial court found said illness was not serious, the word "serious" importing "a grave, important and weighty trouble." But the insured was requested to give the name and address of each physician consulted or who had prescribed for him during the last five years and gave the name of but one, whereas several others had treated and prescribed for him and the omission of the names was held fatal, the court saying:

"The importance to the company of being advised of the names and addresses of all the physicians who attended the applicant for insurance within a limited time, and thus enable it to obtain by inquiry such information as it may deem of importance to the determination of whether the risk should be accepted, is fully demonstrated by the facts in this case. Dr. Shinault, who was the only physician named in the application as having attended the insured within five years, but who did not attend him during his illness in 1899, testified that that attack of hematuria did not in any way affect the general health of the assured; while on the other hand, Dr. Russworm, who was the physician who had attended the assured during that illness, but whose name was not mentioned in the application, testified that: 'I don't think a man is ever the same after having a severe attack (of hematuria). It makes an inroad upon the system, so a man is not the same he was before he had an attack.' He also testified that 'the attack

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from which the assured suffered was a very severe attack of hematuria.' "

In the present case the importance of a correct answer to the inquiry about physicians consulted is demonstrated by the probability or chance that when McDermott was treated in February for indigestion and stomach trouble he really had incipient cancer.

In Cobb v. Benefit Ass'n, 153 Mass. 176, it was said:

"The sixth question put to the applicant in form A of the application was, 'Have you personally consulted a physician, been prescribed for, or professionally treated, within the past ten years?' To this question the insured answered, 'No,' and it has been found by the jury, upon the second issue submitted to them, that this answer was false. The plaintiff contended that such an issue should only be found against her in case the answer was intentionally false. In our view, the insured having made the truth of his statements the basis of his contract, it was sufficient for the defendant to show that this statement was actually untrue.

"The plaintiff further contended, that the question referred to in the application should be construed as referring to a specific disease, and that if the insured had consulted or been prescribed for by a physician for a pain that did not amount to a disease, his answer to this question would not prevent the plaintiff from recovering. The presiding judge declined to instruct the jury in accordance with this contention, and instructed them that if the insured, being as he supposed in need of a physician, went to one for the purpose of consulting him as to what was the matter with him, and had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, that the insured consulted a physician within the meaning of the interrogatory; and further, that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy, or treated him professionally either by giving him a prescription

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or by administering hypodermic injections of morphine (of which there was some evidence) then he was professionally treated within the meaning of the interrogatory, or professionally prescribed for. The ruling appears to us correct. While the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remained unanswered is, 'If so, give dates, and for what diseases.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question can not be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

In Life Assurance Society v. Reutlinger, 58 Ark. 528, after discussing the scope of inquiries touching the state of health of an applicant for insurance and ruling that, though such inquiries are made in language that will include the most trivial ailments, still, in consideration of their purpose, they will, if possible, be interpreted to embrace only such diseases or injuries as affect the risk assumed, the court held that a different interpretation must be put on inquiries regarding medical attendance. The lower court had given an instruction like one given in this cause, to the effect that calling on a physician for a temporary ailment or indisposition did

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not falsify the statement that the insured had never been treated by a physician made in answer to the question: "When and by what physician were you last treated and for what complaint?" In discussing that instruction the Supreme Court said:

"The court evidently attempted to enforce the rule we have stated, but erred as to the purpose and meaning of the question, and in so doing, misapplied the rule. In the application of Reutlinger the following clause appears: 'All provisions of law forbidding any physician who may have attended me from disclosing any or all information which he acquired by such attendance are hereby expressly waived.' In his examination by the medical examiner he was asked the question: 'Have you ever had any serious illness or personal injury, or ever undergone any surgical operation?' He answered 'No.' He was asked if he ever had any one of forty-seven different diseases, and he answered 'No.' After this he was asked to give the name and residence of his medical attendant and he answered that he had no physician. He was then asked, 'When and by what physician were you last attended and for what complaint?' To which he answered, 'Never called a doctor in his life.' In the last mentioned interrogatory two questions were combined in one: (1) he was asked, 'When and by what physician were you last attended?' (2) 'If so, for what complaint?' The object of asking 'for what complaint' was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask, in connection with it, 'When and by what physician were you last attended?' The question takes for granted that if he had been attended by a physician, it was in a case of sickness; and the words 'for what complaint' were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. The obvious purpose of it was to ascertain the name of a person from whom informa-

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tion affecting the risk of insuring the life of Reutlinger could be derived. In furtherance of this purpose he had agreed in his application that any physician who had attended him might disclose any or all information which he acquired by such attendance. The answer given, if it be correctly written, clearly indicates that Reutlinger so understood the question. It did not aver a condition of health, or that it was not requisite or proper to request the attendance of a physician. It averred that he had never called a physician to attend him in sickness. He warranted this statement to be true, and the evidence adduced at the trial of this case tended to prove that it was untrue—a breach of warranty."

That reasoning applies forcibly and accurately to the case in hand; for the questions involved were practically identical, there being no material difference between the word "complaint" as signifying illness, and "ailment," while the other interrogatories contained in the two applications were about the same, as was, also, the waiver of the right to claim a privilege as to the testimony of any physician the applicant had consulted.

In Phillips v. Life Ins. Co., 9 N. Y. Supp. 836, the insured, instead of giving the name of the physician who had treated him, gave the name of one who usually treated his family, whereas he himself had been treated by another physician; and this was held a breach of warranty because the question called for the name of the doctor, the date of treatment and for what the services were required.

In Modern Woodmen v. Van Wald, 49 Pac. 782, the question was, had the defendant consulted a physician in the last seven years; which, of course, meant for a personal ailment; for no one would contend that consulting a physician on any other subject would be a breach of warranty. The insured answered in the negative and the trial court instructed the jury that the question must be taken to mean a consultation about some indisposition of an apparently grave character and that an inquiry regarding a trivial or merely tem-

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porary ailment was not intended. As to that charge the appellate court said:

"This is importing into the contract a condition not put there by the parties. The defendant company had a right to know truthfully whether the deceased had consulted a physician for any purpose, whether the consultation was with regard to some grave indisposition or a slight ailment. The question was, 'Have you consulted a physician?' It was for the company to know. They had a right to inquire themselves with regard to the matter, whether it was a grave indisposition, a serious illness, or a slight ailment, before entering into the contract. The answer gave them no opportunity to do so. The literal, exact truthfulness of the answer was made a warranty in the contract upon which it was based. It was so agreed in the body of the contract."

In Life Ass'n v. McDaniel (Me.), 57 N. E. 695, the applicant stated that he had not consulted a physician within a certain period, which was untrue; but it was contended that because the disease and the treatment left no vice in his constitution the company was not exonerated from liability. The court said:

"We think it may be conceded that the concealment of the fact that the insured had had a cold which yielded readily to treatment was not a misrepresentation of a material fact, but under the decisions we are of the opinion that a statement of the insured in his application that he had not been attended or treated by a physician was a misrepresentation of a matter not material to the risk."

In Society v. O'Hara, 120 Penn. St. 356 (approvingly cited by our Supreme Court in the Aloe case), it was said:

"If specific inquiries are made whether insured had medical attention within a stated period of time, the fact is thereby made material and must be disclosed."

Where the inquiry was "How often has medical attention been required?" and the answer was "Two years ago" and the name of the physician being asked, the insured gave the name of one doctor who had treated

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him a year before; but omitted to state another who treated him during a dangerous relapse, the policy was held void, though no fraud was intended. Cazenove v. Assurance Co., 29 Law J. (N. S.) Com. pl. 160.

When the applicant said he had not consulted a physician since childhood and did not remember the names of doctors who had treated him, but he had in fact consulted one within two years and knew his name, the warranty was broken. Insurance Company v. Arhelger, 36 Pac. 895.

Where the applicant was called on to give the name and address of each physician who had attended him within a stated period and he gave the name and address of one, but had been attended by two others, the answer was held untrue and the policy vitiated. Brady v. Life Ass'n, 60 Fed. (C. C. A.) 727.

In Sladden v. Life Ins. Co., 86 Fed. 102, the applicant said she had had no physician, but she had in fact been treated by one within two months and this was held fatal.

"Neither would the untruthfulness of the answer in respect to Dr. Ingalls have been mitigated if it had been shown that the medical examiner told Mrs. Sladden that he did not wish her to mention any slight cold or accident she may have had, and the physician whom she had consulted, and that she should answer only grave and serious matters. The impropriety not to say absurdity, of permitting an applicant for insurance to determine what matters of health, which at the time were deemed grave enough to go to a physician about, were too slight and unimportant to mention to a medical examiner when applying for insurance, could not well be emphasized more strongly than by the facts of this case."

Decisions similar to the foregoing will be found in White v. Society, 103 N. Y. 341; Life Ins. Co. v. Llewellyn, 58 Fed. 940; Schwarzbach v. Protective Union, 25 W. Va. 622; Geach v. Ins. Co., 20 N. Y. 293.

More or less opposed to the views expounded in the cases above mentioned are the following authorities:

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Brown v. Ins. Co., 65 Mich. 306, and other cases in that State; Life Ass'n v. Ogletree (Miss.), 25 Southern 869 (a case of misrepresentation, not of warranty); Woodward v. Life Ins. Co. (Tenn.), 56 S. W. 1020; Billings v. Ins. Co., 41 Atlantic (Vt.) 516. In the last case the names of some physicians who had treated the insured were not given, but it was held the interrogatories were so framed that he had a right to assume they were not called for.

We regard some of the latter decisions as either losing sight of the object of such questions or, in effect, abrogating one part of the contract of insurance.

It is of course to be noticed in all cases not only what the terms of the question are, but also whether the answer to it was a misrepresentation or a warranty and, hence, whether the simple fact that the answer was not literally true was sufficient to avoid the policy.

Finally, we refer to the rule declared by the Supreme Court of Missouri, that when the parties to a contract of insurance have provided that statements made to obtain the policy are warranties, their falsity avoids the contract whether they were material or not, unless the contract falls within the exemption that misrepresentations must contribute to the loss to have that effect. Whitmore v. Supreme Lodge, Hanford v. Ass'n, Jacobs v. Ass'n, Aloe v. Ass'n, supra; Hayne v. Knights Templars, 139 Mo. 416.

In the Aloe case, the subject was extensively treated and our Supreme Court, speaking by Judge BURGESS, approved the following proposition declared by the Supreme Court of Maine:

"We do not think any court in the absence of a modifying statute has gone to the extent of expunging from a contract or disregarding in its construction any statement or item which the parties distinctly and in terms agreed should be regarded as material and essential to the contract."

In our opinion McDermott's contract as a whole, including the certificate and also his application with its questions and answers, can not reasonably be inter-

preted to call for information as to physicians who had treated him only for grave illnesses, leaving him to decide in the first instance and the jury in the last, whether his ailment was grave or not. The second part of the question asking for dates, the ailment treated and the name and address of the physician, and also the other interrogatories about serious diseases, exclude such an interpretation, which would defeat the purpose of the inquiry.

As to the argument that it is impossible for a person to remember the names and addresses of physicians who treated him for small ailments during seven years, and that a contract should not be so interpreted as to require an impossibility, we say that courts are bound to interpret the language of agreements in its usual sense. It may be impossible for one to recall the names and addresses of all physicians whom he consulted during seven years for serious as well as for slight ailments; but neither fact is such an absolute impossibility as to be excluded by law from the list of things about which agreements may be made. When parties *sui juris* make hard but permissible contracts, courts can not decline to enforce them, as has been said numberless times. If an application for insurance calls for events of which the remembrance is uncertain, the applicant should so state. In this case, however, there can be little doubt that McDermott remembered visiting or being visited by his doctor in February. As it is conceded he misstated the fact and as the answer was a warranty, the judgment is reversed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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THEODORE H. KOELLING, Appellant, v. AUGUST GAST BANK NOTE AND LITHOGRAPHING CO. et al., Respondents.

St. Louis Court of Appeals, January 20, 1903.

1. **Replevin**: CHATTEL MORTGAGE: EVIDENCE: ERROR: PRACTICE: TRIAL. In replevin, where defendant claimed title by foreclosure of a chattel mortgage given by one whose title plaintiff denied, it was not error to admit evidence tending to establish the indebtedness of the mortgagor to the defendant.

2. ——: ——: ——: AGENT. In replevin where both parties deny that a purchaser of the property at a chattel mortgage foreclosure was acting as the agent of its grantor, instructions ignoring such controlling issue were properly refused.

3. ——: EVIDENCE. In replevin, evidence examined, and *held* sufficient to support a finding that the purchaser of the property at a certain chattel mortgage sale acted as the agent of defendant's grantor, rather than of plaintiff's.

4. **Instructions**: PRACTICE; TRIAL. Requested instructions are properly refused which are covered by instructions given.

Appeal from St. Louis City Circuit Court.—*Hon. Selden P. Spencer,* Judge.

AFFIRMED.

Joseph T. Tatum for appellant.

(1) The court should have given the instructions asked by plaintiff. The deliveries to Filley and to plaintiff were effective. "Symbolic delivery by bill of sale is sufficient to vest title and a right to replevy." Collins v. Wayne Lumber Co., 128 Mo. 451. (2) Possession by agent is actual, not constructive possession by the principal, and will support a possessory warrant by the latter against one who wrongfully take possession. Cobbey on Replevin, sec. 108. (3) It is not es-

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sential that the plaintiff should ever have had the actual possession, but he must have had such title that he was authorized to reduce the goods to his possession at the commencement of the suit. Cobbey on Replevin, sec. 89. (4) The club was not incorporated, did not even exist, at the time of purchase; if the bill of sale had been made to it, instead of to Hedges, the agent of Filley, it would have been void. There is no estoppel, no equity against plaintiff. Reinhardt v. Mining Co., 107 Mo. 616. (5) The attempted transfer by mortgage and sale forfeited the permission to the club to use the property, and gave to Filley or his assignee the right to immediate exclusive possession; the acts of Ambs and the Gast company through Wall were trespass, though actual trespass on the part of defendant is not essential; in fact plaintiff was bound not to stand by and permit the property to be sold and taken without interfering. Skinner v. Stouse, 4 Mo. 93. (6) The facts do not establish a resulting or implied trust in Mr. Filley. The following culled from the decisions in this State clearly set forth the well-established rules: "There should be no room for a reasonable doubt as to the facts relied upon to establish a resulting trust. A mere preponderance of the evidence is not sufficient." "The evidence must be so clear, strong and unequivocal and so definite and positive as to leave no room for doubt as to the existence of the trust." "It is not sufficient even to show the possession of the money and the purchase of the property by the alleged trustee. The money must be clearly and distinctly traced into the property. It must be clear that the property has been paid for out of the trust money." Johnson v. Quarles, 46 Mo. 423; Adams v. Burns, 96 Mo. 361; Burdett v. May, 100 Mo. 13. (7) "The doctrine of resulting trusts applies in all its phases to personal as well as real property." 10 Am. and Eng. Ency. of Law, 14; Flint on Trusts, sec. 68; Kramer v. McCaughey, 11 Mo. App. 426.

No brief for respondents.

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REYBURN, J.—This, an action in replevin, first brought before a justice of the peace in the city of St. Louis, was appealed by the defendants August Gast Bank Note and Lithographing Company, Louis J. W. Wall and Joseph B. Ambs, to the circuit court, where March 12, 1902, upon trial before a jury, a verdict and judgment were rendered in their favor. The defendant lithographing company claims title to the property by foreclosure of a chattel mortgage executed by the Good Government Republican League Club, and plaintiff derives his title through a bill of sale executed by Chauncey I. Filley. In October, 1898, the property in question belonged to the Union League Club, a republican political organization of St. Louis, and upon the disruption of this club, was sold under the provisions of a chattel mortgage, and at this foreclosure sale was bid in by Isaac A. Hedges at the price of $100. Hedges made the purchase in a representative capacity, and this proceeding presents the dispute whether in such purchase Hedges acted as the agent of Filley himself, personally, or as representative of an association of gentlemen, including Filley, then in course of promoting a new political club, of which afterwards, January 21, 1899, the organization was perfected, and a charter finally issued February 10, 1899 under the title "Good Government Republican League Club of St. Louis," Filley becoming a member thereof, as he stated, on January 21, 1899. While those interested in the organization of the new political club were casting about for suitable quarters for a clubhouse, they received information that differences had arisen among the members of the Union League Club, which might render it practicable to acquire the latter's clubhouse, number 2721 Pine street, then furnished and equipped for such purposes. Negotiations were therefore entered upon and cautiously conducted by those interested in the new enterprise, with those in control of the Union League Club, and an arrangement finally reached between them that upon payment by the new club's promoters of outstanding debts of the old club, aggregating about $700,

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the lease of the clubhouse of the latter, together with the furniture and equipment contained therein, would be transferred for the purposes of the new club. In these negotiations the Union League Club was represented by R. J. Delano, and Hedges acted on behalf of the members of the club proposed to be created. Filley had charge of and managed the organization of the new club, and was entrusted by his associates with the entire charge of the details. Though Hedges dealt directly with Delano, he reported progress from time to time to Filley, and the proposed members of the new organization came together several times at the dwelling of Filley to discuss and form their plans, and no step was taken without his approbation. After the terms of purchase had been arranged with Delano, Filley undertook to raise the funds required, and gave Hedges on December 14, the day of sale under the chattel mortgage, the sum of $100 with which to bid in the property at that price, as had been agreed upon, and Hedges, accompanied by John P. Hermann, attended the sale, and according to arrangements previously made, bid in at the foreclosure sale all the furniture of the clubhouse at the stipulated price. The testimony established that Filley solicited subscriptions from a number of parties, and obtained a considerable sum of money for the purposes of the Union League Club, and the receipt of these funds was not denied by Filley, but he insisted they were intended solely for the payment of the indebtedness of the Union League Club, and were not for the purchase of its furniture and equipment, and were all collected after the sale under the chattel mortgage between the 14th and 20th of December. Upon making the successful bid at the chattel mortgage sale, Hedges took from Delano, as trustee, a bill of sale, conveying to himself individually the property purchased, and delivered it to Filley, who caused it to be recorded. After the sale, the property which was contained in the clubhouse of the Union League Club remained therein undisturbed, and passed into the possession and use of the Good Government Club after

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its incorporation, and continued in its possession till about the date of the institution of this action. No bill of sale was ever executed by Hedges transferring the property purchased, to the Good Government Club, but he retained the title in his own name during the period that he was treasurer of the new organization, and when he withdrew therefrom he says he executed a bill of sale of the property to Filley, Wall and Brownell; these latter-named parties were liable as guarantors for the rental of the premises occupied by the Union League Club, and Hedges testified he executed this bill of sale for the purpose of securing them as such guarantors. Plaintiff's counsel, however, asserted that Hedges executed no bill of sale for the furniture, but had reference to assignment by indorsement of the lease of the clubhouse, and in the incomplete condition of the record in this regard, this version will be adopted.

On October 18, 1901, the day prior to this action, Filley executed a bill of sale to plaintiff for the property in question; on September 25, 1901, the Good Government Club executed a chattel mortgage, duly recorded, conveying the same property to secure, to the lithographing company, the payment of a note for $391.62, the latter instrument reciting that the property mortgaged was the same acquired by the club from Hedges. On October 19, 1901, Wall enforced the terms of the chattel deed of trust by foreclosure sale, at which defendant Ambs, in the interest, however, and as representative of the lithographing company, became the purchaser, and received possession of the property. The parties to the suit stipulated that the question of damages was not to be considered, and that if the verdict should be for the plaintiff, judgment should be for possession, and defendants should pay the costs, and that if the verdict should be for the defendant, plaintiff should pay the costs, and defendants should have their election to take the property, or $400, its agreed value.

The court of its own motion gave the following instruction:

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"Gentlemen of the jury: The question for you to determine in this case is, who was, on October 19, 1901, entitled to the possession of the personal property replevined in this case, about the description of which there is no dispute?

"If from the evidence you find and believe that the said personal property was, in December, 1898, purchased by Isaac A. Hedges as the agent for Chauncey I. Filley, and that the money paid therefor was the money of said Chauncey I. Filley, and that thereafter the said Chauncey I. Filley assigned his interest therein to the plaintiff, Theo. H. Koelling, then your verdict should be for the plaintiff.

"If, on the other hand, from the evidence you find and believe that the money with which Isaac A. Hedges purchased the said personal property was not the money of Chauncey I. Filley, but belonged to the Good Government Club, or was the proceeds of subscriptions in that behalf, and that the personal property therefore was not bought for the said Chauncey I. Filley but for the said club, and that thereafter the said club mortgaged the said property, and at a sale made under the said mortgage the defendant, August Gast Bank Note and Lithographing Company, purchased the said personal property, then your verdict should be for the defendant."

And refused to give the instructions asked by plaintiff, as follows:

"1. The jury are instructed that there is no evidence to show that the Good Government League Republican Club had any title to the property in the suit, and the verdict must be for plaintiff.

"2. The court instructs the jury that there is no evidence to show that the title to the property in suit was ever in the Good Government League Republican Club, and that the mortgage shown in evidence for the defendant, under which it claims to be a purchaser, conveyed no title to the defendant, August Gast Bank Note and Lithographing Company.

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"3. The jury are instructed that if they believe from the evidence that the property in suit was purchased with the money of Chauncey I. Filley, at his instance and direction, then said Filley became the owner of said property; and, if while such owner, said Filley conveyed same to plaintiff, and delivered to him a bill of sale thereof, then plaintiff became the lawful owner of said property.

"4. The court instructs the jury that if they believe from the evidence that on or about December 14, 1898, Isaac A. Hedges, acting as the agent and representative of Chauncey I. Filley, purchased from the Union League Club the property described in plaintiff's statement, and that the money for the purchase of said property was furnished by said Chauncey I. Filley, from his own means, and that said Chauncey I. Filley afterwards conveyed said property to plaintiff, and delivered to plaintiff a bill of sale of said property, then the verdict should be for plaintiff.

"5. The jury are instructed that if they believe from the evidence that at the time this suit was commenced, the plaintiff was the owner of the property described in his statement, and that the defendant, August Gast Bank Note and Lithographing Company, through any person acting for or in its behalf, took, and at said time held, possession of said property, and had attempted to make a sale thereof, then the verdict must be for plaintiff."

The plaintiff assigns as error the admission of the testimony tending to establish the indebtedness of the Good Government Club to defendant lithographing company, which was secured by the chattel mortgage under which the defendants claim title, but the trial court committed no error in admitting this testimony, as it was competent, in fact essential, to establish the validity of the chattel mortgage under which title was asserted by defendants.

The instructions asked by plaintiff and refused by the court were properly refused, either because of their peremptory nature and that they ignored the controlling

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issue of fact of ownership of the property in dispute, or in so far as they were correct are fully and completely embraced in the comprehensive instruction given by the court for the direction of the jury.

The case presented no legal issues, but solely a distinct issue of fact, which was fairly submitted to the jury in the instruction given by the court, and the verdict of the jury is fully sustained by the evidence offered by the defendants. The doctrine of resulting trusts lacks application to the facts herein presented, as it is merely a question of who was the actual purchaser at the original sale under the chattel mortgage at which Hedges bid in the property.

The verdict of the jury is amply supported by the evidence, and the judgment of the lower court is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

ELIZABETH HENKLE, Assignee, etc., Appellant, v. THOMAS DUNN, Respondent.

St. Louis Court of Appeals, January 20, 1903.

Principal and Agent: COMMISSION: SECURING A TENANT: EVIDENCE. Defendant agreed to pay plaintiff a certain commission if she obtained a tenant for a building which defendant was erecting. She showed the plans to one who wished to rent, and twice visited the building with him, but he refused to rent at the terms offered, After a portion of the building had been rented to other tenants, another real estate agent influenced the one whom plaintiff had solicited, to rent the remainder of the building, and on different terms from those offered through plaintiff; plaintiff took no part in the contract finally made: *Held*, that plaintiff was not entitled to a commission.

Appeal from St. Louis City Circuit Court.—*Hon. O'Neill Ryan*, Judge.

AFFIRMED.

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Alex. J. B. Garesche for appellant.

A. R. Taylor for respondent.

REYBURN, J.—This action originated before a justice of the peace of the city of St. Louis upon the account following:

"St. Louis, June 18, 1901.

"Thomas Dunn,

"To Mary E. Dwyer.

"To commissions for renting property of Thomas Dunn on Lucas avenue between Tenth and Eleventh streets in the city of St. Louis to Morris Lipschitz for a term of five years at a rental of $3,000 per annum (one per cent on $15,000), $150."

An appeal was had to the circuit court of the city of St. Louis, where a jury being waived, the case was tried before the court. The testimony showed that in May, 1900, Lipschitz was desirous of obtaining new business quarters, and had suggested to Mrs. Dwyer to find him a location, and the latter learning that Dunn was about to erect a five-story building at 1009 Lucas avenue, called upon him and he promised that if she obtained a tenant for him he would pay her a commission of one per cent upon the rental of the leasehold term. That thereupon she received the plans and specifications of the proposed building, and submitted them to Lipschitz, and twice visited the building with him while it was in course of erection. Lipschitz stated the building was not finished, criticised its plan, and found fault with the location, and further told Mrs. Dwyer to wait, that the rental demanded, $3,500 per annum, was too high, and that Dunn would take less; until the latter part of October, when the building was approaching completion, Mrs. Dwyer continued her efforts to prevail on Lipschitz to become Dunn's tenant, but she never prevailed on him to accept the rate demanded by Dunn, or offered Dunn a rate acceptable to him. In the meantime, the four upper floors, and later, part of the second floor, through a real estate agent,

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Bowman by name, had been rented to other tenants. About the first of November, the same real estate agent, who had been negotiating with Lipschitz for a year prior in attempting to locate the latter in new business quarters, called upon him and finally influenced him to again look at the remaining unoccupied portions of the Dunn building, namely, the basement, first floor and part of the second floor, and closed a lease therefor at the rate of $3,000 per annum.

The testimony clearly showed that Lipschitz steadfastly refused to make any proposition approved by defendant through Mrs. Dwyer, or to accept any proposition made by her on behalf of the owner of the building to him. At the close of the testimony, the court, at request of plaintiff, gave the following instruction:

"The court declares the law to be that if the defendant authorized the plaintiff to rent the premises of the defendant on Lucas avenue, and that in pursuance of such authority plaintiff did make efforts to rent said premises, and did disclose and introduce to the defendant, Morris Lipschitz, and thereupon negotiations were begun between the plaintiff on behalf of said defendant, and said Morris Lipschitz, and through the exertions of the plaintiff the premises of the defendant were leased to said Morris Lipschitz, then the plaintiff is entitled to recover, even though the final negotiations were at a rental less than that authorized by the defendant, and even though said final negotiations were conducted by another agent of the defendant."

And further gave the following instructions:

"The court declares the law to be that under the pleadings and evidence, plaintiff is not entitled to recover.

"The court instructs that there is no evidence in this case that the leasing of the premises of the defendant to Morris Lipschitz was induced by the plaintiff, and she is not entitled to recover."

From the foregoing statement of the testimony, which presents no issue of facts, it is manifest that

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plaintiff's assignor failed in her diligent efforts to accomplish a lease of the premises between defendant and Lipschitz, and that the latter, after the negotiations theretofore conducted by Mrs. Dwyer had terminated, finding he was compelled to obtain new quarters, finally accepted the tenancy of a portion of the building, which portion was considerably smaller than those parts he originally desired, and at a price higher than he was at first willing to pay for the whole of the portions of the building he deemed he required, but that this tenancy was secured through the independent agency of Bowman wholly without the instrumentality of Mrs. Dwyer. Pollard v. Banks, 67 Mo. App. 187. This case is not within the principle of Bass v. Jacobs, 63 Mo. App. 393, Wright v. Brown, 68 Mo. App. 577, and like authorities cited. The judgment of the court below was therefore correct and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

CHRISTINA BOWER, etc., Respondent, v. THEODORE L. BOWER, Appellant.

St. Louis Court of Appeals, January 20, 1903.

1. **Conversion:** EVIDENCE: INSTRUCTION: ERROR: PRACTICE: TRIAL. Where, in an action for conversion, it appeared that defendant purchased and paid for a stock of goods for his son (plaintiff's intestate) under the agreement that his son should pay him by a certain date, and if the son failed to do so, the agreement should be void, and the goods be turned over to defendant as his property, and there was evidence that the son paid nothing, and turned the goods over to defendant, an instruction that, though the defendant furnished the money, yet this gave him no right to the property as to take possession thereof, was error.

2. ———: ———: ———: ———: ———. In the case at bar, there being evidence that the son turned the goods in question over to defendant, and that he was in possession for several months before the son's death, an instruction which assumed as a fact that defendant took possession of the goods after his son's death, was error.

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3. **Action: CONVERSION: PRACTICE, TRIAL: ANSWER: PLEADING AND PROCEDURE. Where, in an action for conversion of a stock of goods which defendants purchased and delivered to plaintiff's intestate under a conditional bill of sale, defendant in his answer construed such instrument as a chattel mortgage, he could not, without amending his pleading, take a different position on the trial.**

Appeal from Shelby Circuit Court.—*Hon. N. M. Shelton,* Judge.

REVERSED.

V. L. Drain and *N. E. Williams* for appellant.

(1) It has long ago been settled in this State that after condition broken the mortgagee is the absolute owner of the property and can maintain trover therefor even though in the actual possession of the mortgagor. The earlier cases on this question have recently been cited with approval by both the appellate courts in the cases of Burge v. Hunter (K. C.), and Edmonston v. Jones (St. L.) cited below. Upon any theory these instructions for plaintiff are erroneous and prejudicial to the rights of appellant. Cooley on Torts, pp. 512-520; Boone on Mortgages, secs. 258, 296; Cobbey on Chat. Mort., sec. 508; Myers v. Hale, 17 Mo. App. 204; Robinson v. Campbell, 8 Mo. 365; Bowen v. Benson, 57 Mo. 26. (2) The article of agreement shows upon its face that it was prepared by parties unaccustomed to legal forms. This, however, does not vitiate it. If it does not contain sufficient evidence upon its face of the intention of the parties, parol evidence is admissible to prove whether it was intended as a conditional sale or as a mortgage. For this reason the evidence of Carl Bower should have been admitted. 6 Am. and Eng. Enc. of Law (2 Ed.) 443. (3) It may be contended by respondent that the declarations of the court were given upon the theory that the instrument of writing constituted a pledge of the merchandise from Wm. H. Bower to appellant. But the modern decisions are fatal to such a contention. If it be granted that such was the

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nature of the transaction, it resolves itself in its last analysis to a mortgage with slight variations in the rights of each party after the conceded failure of the son to pay the purchase price. In other words, if a pledge, the appellant was entitled to keep them or to sell at his option, and the rights of the pledgor were qualified and restricted to the excess if any remaining after appellant was reimbursed. And the death of Wm. H. Bower could not alter the rights of the parties in the slightest degree. The property was still subject to the lien of appellant. He was vested with the right of possession and all incidents thereto until the price was paid, and there being no tender of the amount due this action could not be maintained. And upon the abandonment by the pledgor in his lifetime the property became appellant's unconditionally. 22 Am. and Eng. Ency. of Law (2 Ed.), pars. 8, 9, 10, pp. 864, 865, 866, 867.

J. D. Dale and *W. O. L. Jewett & Son* for respondent.

(1) In answer to appellant's attacks on the petition respondent deems it sufficient to quote from the petition: "About the 18th day of September, 1897, said Wm. H. Bower departed this life intestate and at the time of his death he was the owner and in possession of a stock of merchandise," etc. When it is alleged that plaintiff is the "owner and in possession," it would be absurd to state that he is entitled to possession. (2) Bank v. Tiger Tail M. & L. Co., 152 Mo. 145, quoted by appellant, simply decides that in trover one must state that plaintiff is either in possession or had the right to possession. This petition states the stronger alternative. (3) Bank v. Fisher, 55 Mo. 51, quoted by appellant, simply decides that a mortgagee can not maintain trover. To same effect are the other authorities quoted by appellant. Respondent admits that if the plaintiff had neither actual possession nor the right he could not maintain trover. (4) On page 746, vol.

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26, Am. and Eng. Ency. of Law, quoted by appellant, this language is used: "Where plaintiff in an action of trover is out of possession, the invariable legal requirement is that in connection with a property absolute or special in the chattels in controversy, he must have had at the time of conversion a right to the immediate possession."

BLAND, P. J.—Plaintiff, as administratrix of the estate of William H. Bower, deceased, brought suit against the defendant, alleging in her petition that her intestate was in the possession of a stock of furniture and undertaker's goods situated in a storehouse in the town of Bethel, Shelby county, Missouri; that after the death of William H. Bower, defendant took possession of said goods and converted them to his own use; that the value of the goods was $3,500.

The answer, omitting caption, is as follows:

"Defendant answering plaintiff's petition herein denies each and every allegation therein contained.

"For another and further answer and defense defendant says that on the sixth day of May, 1895, he loaned William H. Bower, since deceased, the sum of two thousand forty-one dollars and sixty-one cents; that same was invested in the purchase of a stock of furniture and undertaker's goods, the same being the stock of merchandise in controversy, except the jewelry, which was not a part of said stock and was never at any time owned by the deceased or any of the parties to this suit and to which none of said parties ever at any time had any interest or control over. That subsequently, on the seventh day of May, 1895, defendant and said William H. Bower entered into a contract in writing whereby it was agreed that if the note given by said William H. Bower for the purchase price aforesaid, to-wit, the sum above was not paid by the seventh day of May, 1897, that the said stock of goods should be turned over to and become the property of this defendant.

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"That said purchase price was not paid defendant nor any part thereof, and that in accordance with said agreement said stock of goods was turned over to defendant and became his property, unconditionally, and said note was cancelled and is now tendered plaintiff in this answer. Defendant says that at the death of said William H. Bower said stock of goods was the property of defendant and that said William H. Bower had no interest whatever therein. And having fully answered defendant prays to be discharged with his costs."

The reply was a general denial of the new matter in the answer.

The evidence is that defendant purchased the goods in 1896, from his brother, and paid him for them and put William Bower, who was his son, in possession and control of the goods, under a written contract to be hereafter noticed.

For plaintiff the evidence is that William Bower took charge of the store and goods and dealt with them as his own and tends to show that he continued in charge of them until his death in September, 1901; that after his death defendant took charge of the store and goods and converted the goods to his own use.

Defendant paid $2,041.60 for the goods when he made the purchase, and the evidence is that there was about the same amount of goods on hand when William Bower died as when he first took charge of them.

For the defendant the evidence is that when he made the purchase of the goods the following contract was entered into between him and William Bower:

"Bethel, Missouri, Shelby county, May 7, 1895.

"Between T. L. Bower, party of the first part, and W. H. Bower, party of the second part. T. L. Bower, party of the first part, agrees to furnish the money to buy stock of furniture and undertaker's goods of W. C. Bower, and W. H. Bower, party of the second part, agrees to run and sell the furniture and undertaking for party of the first part and further agrees to pay all running expenses and rent, and pay six per cent inter-

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est on purchase money, and party of the second part to receive all profits after paying expenses; and it is further agreed that if the purchase money and interest not being paid by party of the second part by May 7, 1897, then the above agreement shall be null and void and shall then be turned over to party of the first part as his property.

(Signed) "T. L. Bower, party of the first part.
(Signed) "W. H. Bower, party of the second part."

The evidence further shows that William Bower was the son of defendant and was a man of dissolute habits; that plaintiff had been divorced from William Bower and had in her divorce suit obtained a judgment of alimony against him which had not been paid; that in May, 1897, William Bower had paid nothing on the goods to his father and early in that month he surrendered them to his father for the reason that he was unable to pay for them and that he intended to go West to better his condition; that after the surrender of the goods to his father he continued to live with him and stayed about the store part of the time and aided in selling goods but that the business was mostly conducted by the defendant's daughter and other members of his family in the name of and for the defendant.

For the defendant the court gave correct instructions to the effect that if defendant took possession of the goods under the written contract between himself and son before the death of the son, plaintiff could not recover.

For the plaintiff the court gave the following erroneous instructions:

"2. Though the jury may find that the defendant furnished the money to pay for the property in controversy, yet this gave him no right to the property, or to take possession thereof."

"4. Though the jury may believe that defendant had a written contract with his son, William H. Bower, by which it was agreed that in case said son did not pay for the property by a certain date the property was to become defendant's, still this gave defendant no legal

right to take possession thereof after the death of William H. Bower."

Number 2 ignores the existence of the written contract between defendant and William Bower, and No. 4 assumes as a fact that defendant took possession of the goods after the death of William Bower, the vital question in issue.

Defendant asked the following instruction, which was refused:

"If you find from the evidence that Theodore L. Bower furnished the money for the purchase of the goods in controversy, and that William H. Bower signed the contract read in evidence, then your verdict must be for the defendant, unless you further find that William H. Bower repaid the purchase price thereof to his father."

The uncontradicted evidence is that the owner refused to sell the goods to William Bower and that he did sell them to defendant and defendant paid him for them. If we should construe the contract between William Bower and defendant in the light of this evidence, we would hold the writing to be a conditional bill of sale and that the goods were the absolute property of the defendant, if they were not paid for as agreed in the written contract. But the defendant by his answer has construed the writing to be in the nature of a chattel mortgage and he could not, without amending his pleadings, take a different position on the trial.

For error in giving instructions Nos. 2 and 4 for plaintiff, the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

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JOHN F. PATTERSON et al., Appellants, v. C. D. YANCEY et al., Respondents.

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St. Louis Court of Appeals, January 20, 1903.

1. **Change of Venue:** BILL OF EXCEPTIONS; WHO SHALL SIGN: JUDGE: AUTHORITY TO SIGN BILL OF EXCEPTIONS. Where a change of venue was granted, and the cause tried by the judge of the circuit of the county to which the change belonged, and after the denial of a new trial, and before the expiration of the time fixed for the filing of the bill of exceptions, such county was taken out of the circuit presided over by the judge who tried the cause, and attached to another circuit, such fact did not deprive the judge trying the cause, who still remained in office, of jurisdiction to settle and sign the bill of exceptions.

2. ———: ACTION TO RESTRAIN COLLECTION OF JUDGMENT: PLEADING: JUDGMENT BY DEFAULT: STATUTE OF LIMITATIONS: APPEAL: WRIT OF ERROR. A suit to restrain the collection of a default judgment can not be maintained on the ground that the pleadings showed that the action was barred by the statute of limitations, such objection being available by appeal or writ of error.

3. **Action:** PAROL EVIDENCE: RETURN OF SHERIFF: HOW CONTRADICTED: SERVICE. In an action to restrain the collection of a default judgment, parol evidence is admissible to prove a mistake of the clerk in filling out the copies of the writs of summons, requiring the defendant to appear at the December term instead of the April term.

4. **Mistake of Clerk in Filling Blanks in Writ of Summons:** PRACTICE, TRIAL: APPEARANCE BY ATTORNEYS. Where several defendants appeared at the April term of the circuit court, by attorney, and answered the petition, the fact that the clerk by mistake made the copies of summons served on them returnable at the December term following was immaterial.

5. **Attorney At Law:** AUTHORITY OF ATTORNEY TO ACT FOR CLIENT: EVIDENCE. Where three attorneys were employed to defend in an action, evidence of one of such attorneys that one of the defendants did not engage him to act as his attorney, without any showing as to the authority of the other attorney to represent such defendant, was sufficient to establish that such attorneys had no authority to appear for him in the action.

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6. **Action:** JUDGMENT: WHEN SET ASIDE: MISTAKE OF CLERK. When a copy of the summons served on one of the several defendants required him to appear at the December term instead of the April term, at which an answer was filed by the other defendants, and a change of venue granted to another county, after which a default judgment was entered against all of the defendants, and there was evidence that such defendant was misled by the mistake in the summons, and authorized no appearance for him but intended to employ an attorney to appear at the December term, the judgment as to him should be set aside.

7. **Change of Venue:** DUTY OF PARTIES: JUDGMENT BY DEFAULT: STATUTORY CONSTRUCTION. Section 825, Revised Statutes 1899, provides that, after a change of venue, the clerk shall transcribe all the record immediately, and transmit it to the clerk of the circuit court to which the change is granted, under the penalty of one hundred dollars to the aggrieved party for failure to do so. Section 828, Revised Statutes 1899, provides that the party applying for the change shall pay the costs, which, if he fails to do within fifteen days, a fee bill may be issued against him and his sureties. *Held*, that, where a change of venue was granted on plaintiff's application, a statement by the clerk to defendant's attorneys that he would not remit the transcript until the costs had been paid, was no excuse for their failure to appear at the next term of court to which the change was granted, so as to entitle defendants to restrain the collection of a default judgment obtained at such term for their failure to appear.

8. **Surety of Sheriff's Bond:** JUDGMENT: VACATING JUDGMENT: PRACTICE. TRIAL. Where the sureties on a sheriff's bond were jointly and severally liable, the fact that a default judgment rendered against one of such sureties was erroneous for want of proper service did not require a vacation of the judgment as to the other sureties.

Appeal from Carter Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED (*except as to defendant Dalton*).

Thomas Mabrey, A. J. McCollum and *Jno. M. Atkinson,* with whom is *Everett W. Pattison* for appellants.

(1) Upon the pleadings in the action on the bond the defendants in that action were entitled to judgment in their favor, and the Carter Circuit Court should have

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rendered such a judgment. Accordingly, a court of equity will do now what that court should have done in the original action. Spurger v. Hardy, 4 Mo. App. 573; State ex rel. v. Spencer, 79 Mo. 314; Shelby County v. Bragg, 135 Mo. 291; Farris v. Coleman, 103 Mo. 352. (2) As to those plaintiffs here (defendants in the original action) who were commanded to appear at the December term, the judgment is a nullity. Holliday v. Cooper, 3 Mo. 286; Bobb v. Graham, 4 Mo. 222; Ellis v. Jones, 51 Mo. 180. (3) Under the circumstances of this case, the judgment in the original cause should be held to be an entirety, and should be set aside not only as to the defendants who were improperly served but also as to all the defendants. (4) The fact that defendants were misled by the promise of the clerk as to sending of the transcript, is of itself a sufficient ground for setting aside the judgment. Smoot v. Judd, 161 Mo. 673; Payne v. O'Shea, 133 Mo. 129; Martin v. St. Charles Tobacco Co., 53 Mo. App. 655. (5) The return of the coroner is not conclusive, and does not bind the defendants who were improperly served. Smoot v. Judd, 161 Mo. 673; Atwood v. Atwood, 55 Mo. App. 370; Milner v. Shipley, 94 Mo. 106.

Dinning, Hamel & Dinning for respondents.

(1) There is no error in this record prejudicial to the appellants, if the so-called bill of exceptions filed in this cause were a legal one, but there was no legal bill of exceptions filed herein. On the 13th of March, 1901, the Legislature redistricted the State into judicial circuits, and fixed the terms of court therein, and in this redistricting Carter county, the county where this case was tried, was placed in the Twentieth judicial circuit. Prior to that time, it had belonged to the Twenty-second judicial circuit. The Forty-first General Assembly adjourned on March 18, 1901, and there being no emergency clause to the law redistricting the State, the same took effect June 16, 1901. After that time, the Honorable J. L. Fort was not judge of the circuit court of

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Carter county, and had no right to sign the bill of exceptions. Section 731, R. S. 1899, reads: "In any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard." (2) The allegation in the petition for injunction, that "the defendants in the case of the State ex rel. v. Patterson et al., had a valid defense" without setting out that defense, was not sufficient. That defense, if it existed, should have been specifically set out in the bill, that it might be seen that the defense was meritorious. Pry v. Railroad, 73 Mo. 126. (3) The general appearance of the defendants to the action in State ex rel. v. Patterson, in the filing of a motion for an additional bond for costs; the filing of answer for all of the defendants, setting up a general and special defense to the action, and the appearance to the application for a change of venue, and the selection of the court to which the case should be sent, was absolutely binding on the defendants. Pry v. Railroad, 73 Mo. 127. In this case the defendants appear and disappear and reappear, and then complain, in a court of equity, that they never did appear, only in part. (4) The objection that the amount of the money for which judgment was given, must appear in the minutes of the judge and the clerk's minutes, is not well taken, as is well settled by our own courts. Platte County v. Marshall, 10 Mo. 346; Fontaine et al. v. Hudson, 93 Mo. 62. (5) A summons regularly returned as served by the delivery of a true copy of the petition as furnished by the clerk, and a copy of summons, can not be contradicted by the oral testimony of the party served, nor otherwise, or at all. Phillips v. Evans, 64 Mo. 17; Warren and Dalton v. Lusk, 16 Mo. 102; Heath v. Railroad, 83 Mo. 617; Decker v. Armstrong, 87 Mo. 316; State ex rel. v. Finn, 100 Mo. 429.

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GOODE, J.—The object of this suit is to enjoin the collection of a judgment which was recovered by C. D. Yancey, one of the defendants herein, against John F. Patterson, G. M. Patterson, J. A. Christian, G. A. Bingham, E. R. Hicks, Joseph Dalton, Herman Borth, R. C. Barrett, Thomas Clark, Neely Moore, Nathan Price, J. A. Ponder and W. H. Merrill, the plaintiffs herein, on September 20, 1900.

John F. Patterson was sheriff of Ripley county, Missouri, qualifying as such in January, 1893, and during his term C. D. Yancey recovered a judgment against one Lane in which an execution was issued and delivered to said Patterson. The other plaintiffs in the present action were said Patterson's sureties on his official bond as sheriff, and because of his alleged misconduct in the matter of the special execution against Lane, Yancey instituted an action against him and his said sureties on the bond.

That action was begun in the circuit court of Ripley county on the twenty-eighth day of December, 1899, and was returnable to the April term of that court, which had two terms a year, to-wit, in April and November. A summons to the defendants was issued and placed in the hands of the coroner for service, one of the defendants (said John F. Patterson) being the sheriff of the county, and the coroner made a return showing personal service on all the defendants of a writ of summons, which commanded them to be and appear at the next term of the Ripley Circuit Court to be begun and held on the first Monday in April, 1900. This service was made on January 30, 1900. Three of the defendants in that action (plaintiffs in this one) to-wit, Neely Moore, J. A. Ponder and Joseph Dalton, instead of being summoned to appear at the April term, 1900, of the Ripley Circuit Court, were, by a mistake of the clerk of that court in filling out the blank writs of summons, commanded to appear at the December term thereof, 1900, as was shown by the introduction in evidence of the copies of the summons left with them. This fact is material as to defendants Ponder and Dalton,

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but immaterial as to Neely Moore, because he was shown to have employed counsel who represented him at the April term, 1900, of the Ripley Circuit Court; whereas there was testimony tending to show that Ponder and Dalton did not employ counsel and were not represented at that term.

An answer to plaintiff's petition in the action was filed in behalf of all the defendants and signed by three attorneys who purported on the face of the answer to represent and act for all the defendants. These attorneys were Thomas Mabrey, G. W. Crowder and A. J. McCullom. The answer admitted the election of John F. Patterson as sheriff, and that he qualified in that capacity, giving a bond with the other defendants as sureties thereon, but denied all other allegations of the petition and set up as a further defense the three-year limitation statute. Said answer was filed April 4, 1900, and was met by a replication setting up facts in avoidance of the plea of the statute of limitations.

Yancey made application for a change of venue from Ripley county and by direction of the defendants the venue was changed to the circuit court of Carter county. J. P. Campbell, circuit clerk of Ripley county, made out the transcript but, according to the testimony of Neely Moore, told the latter it would not be forwarded until the costs were collected from or paid by Yancey. Thomas Mabrey, one of the attorneys for the defendants, also testified that Campbell made the same statement to him. The transcript was sent to Carter county, however, in time for the case to be docketed for trial at the September term of the circuit court, at which term Yancey appeared and introduced testimony in support of his petition, but the defendants did not appear nor make any defense; so judgment went against them for about six hundred dollars, on which an execution was afterwards issued. That judgment and that execution are sought to be enjoined in the present suit on the grounds that Ponder and Dalton were never properly summoned in the action and did not appear therein nor authorize any attorney to appear for them, and that

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all the other defendants or their attorneys were deceived by the aforesaid statement of the clerk of the circuit court of Ripley county in regard to sending the transcript to the circuit court of Carter county, and, relying on those statements, made no defense in the latter court nor had any knowledge of the cause being there until after judgment had been rendered against them and execution issued thereon.

The present proceeding was tried before the Hon. J. L. Fort, judge of the circuit court of Carter county, and resulted in a decree dismissing the plaintiff's bill, from which decree an appeal was taken to this court. Prior to the adjournment of the term of said circuit court at which the decree was rendered, to-wit, the April term, 1901, Judge Fort overruled the motions of the plaintiffs for a new trial and in arrest and extended the time for filing the bill of exceptions to a day during the ensuing vacation of the court. Before that day came, Carter county had been taken out of Judge Fort's circuit (the Twenty-second) and attached to the circuit of Hon. W. N. Evans (the Twentieth) by an act of the Legislature; but when their bill of exceptions was prepared plaintiffs presented it to Judge Fort and it was signed by him and filed in the office of the circuit clerk of Carter county on January 24, 1901, which was within the time fixed, but several months after said act of the Legislature had taken effect.

1. Settling and signing bills of exceptions are judicial acts which must be performed by a judge under the sanction of his oath of office, and, unless a different rule has been prescribed, by statute, by the one who tried the case and to whose rulings the exceptions were taken. Consaul v. Liddell, 7 Mo. 250; Cranor v. School District, 18 Mo. App. (K. C.) 397; Law v. Jackson, 8 Cow. (N. Y.) 746; Wheeler v. Fick, 4 New Mex. 14. As a bill when signed and filed imports that verity which other parts of the record in a cause import, it ought to be settled, if possible, by the judge who has personal knowledge concerning what exceptions were saved and who can, therefore, see that only facts are brought into

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the record when the bill is allowed. In Cranor v. School District, supra, it was said: "The statute contemplates that the matter of exceptions comes under the personal observation of the trial judge and that the error is called to his attention at the time and the exception then and there taken." From these considerations it has been often held, when the judge who heard a case had died or vacated his office before the party against whom the decision went could prepare his bill of exceptions, that a new trial must be granted in the interest of justice. Crittenden v. Schermerhorn, 35 Mich. 370; Wright v. Judge Superior Court, 41 Id. 726; State v. Weiskettle, 61 Md. 48; Issler v. Haddock, 72 N. C. 119; Newton v. Boodle, 54 E. C. L. 795. This practice conforms to the rule that, in the absence of a statute to the contrary, motions for new trials pending before a judge who dies or goes out of office must be sustained by his successor. Woolfolk v. Tate, 25 Mo. 597; Crocker v. Crocker, 56 Mo. 180. The first of those two cases was tried and decided at a term of the Marion Circuit Court and a motion for a new trial was left undisposed of at the end of the term, and during the ensuing vacation an act of the General Assembly took effect by which Marion county was included in another judicial circuit the judge of which afterwards refused to disturb the verdict in the cause because he had not heard the evidence; but the Supreme Court held that he should have granted a new trial rather than deny the losing party a chance to have his motion considered on its merits.

Following that rule and the other cases cited, instead of affirming the judgment we would be bound to say that these appellants are entitled to a new trial if their bill of exceptions is invalid because of the statute transferring Carter county to another judicial circuit, unless their own negligence or misunderstanding of the law prevented them from obtaining a valid one.

But respondents contend the appellants were at fault because a statute was in force at the time which empowered Judge Evans, as successor of Judge Fort,

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to settle and sign the bill and took away the latter's power to do so. The statute relied on is as follows:

"In any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard." R. S. 1899, sec. 731.

What is the effect of that statute on the matter in hand? We have not found a decision by an appellate court of this State prior to its enactment, or since, that an ex-judge before whom a case was tried while he was in office was incompetent to sign the bill of exceptions; but there was a decision shortly before the passage of the statute, and which doubtless caused it to be passed, that the successor of such ex-judge could not authenticate a bill in a case which the latter had tried. Connelly v. Leslie, 28 Mo. App. (K. C.) 551.

We have found the following decisions in other States holding that an ex-judge can not sign a bill in a case he had tried. State v. Weiskettle, Crittenden v. Schermerhorn, supra; Phelps v. Conant, 30 Vt. 277; Faulconer v. Warner, 2 Wash. 525; Smith v. Baugh, 32 Ind. 163; McKeen v. Boord, 60 Ind. 280; Reed v. Worland, 64 Ind. 280. The ruling was the other way in the cases next cited, wherein bills settled and signed, either by a judge no longer in office or by one no longer holding the court where the cause was tried, were upheld as valid. State v. Barnes, 16 Neb. 37; Guick v. Sasche, 31 Id. 312; Fellow v. Tait, 14 Wis. 153; Davis v. Menasha, 20 Id. 205; Halle v. Haselton, 21 Id. 322; Galbraith v. Green, 13 S. & R. (Pa.) 85; Frazier v. Laughlin, 6 Ill. 185; Bacon v. State, 22 Fla. 46; Ex parte Nelson & Kelly, 62 Ala. 376; Stirling v. Wagner, 4 Wyo. 5; Wheeler v. Fick, 4 New Mex. 36. It is noteworthy that the Indiana rule that the succeeding judge must sign the bill, is criticised as unsound by an able author. Elliott, App. Prac., sec. 799.

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The adjudications in favor of an ex-judge's capacity were influenced in some measure by the existence of statutes like ours which permit bills to be signed and filed in vacation. These statutes, while they do not take the settling of those instruments out of the category of judicial duties, do take them out of the category of court duties which can only be performed in term time by orders entered of record; and if all court orders needed to give a bill validity were made by the trial judge in term and duly recorded (such as overruling the motions for new trial and in arrest, allowing the appeal and granting time in vacation to file the bill of exceptions) the signing of the bill by said judge in vacation is consonant rather than opposed to the policy of the law, if he is still an official, even though in the meantime he has ceased to be judge in the county where the trial occurred. For it is to be borne in mind that Judge Fort was still an incumbent of a judicial position when he authenticated the present bill, so that the decisions against an ex-judge's capacity are not exactly in point.

There is a present tendency to uphold bills of exceptions when substantial justice will be thus promoted and the purpose of the bills subserved, rather than to reject them on technical grounds as courts were once prone to do. Vicksburg, etc., Ry. Co. v. Ragsdale, 51 Miss. 458. These instruments are intended to carry into the record of a cause a true narrative of the evidence received and the rulings made which affected the rights of the litigating parties, and which would not otherwise be recorded. When a bill does this, the purpose sought is defeated, instead of realized, by rejecting it on a technical objection. And one court composed of eminent jurists was so impressed by this fact that under a statute such as we have (2 Rev. St. 1899, sec. 10119) requiring a court stenographer to keep notes of the testimony and exceptions, a bill containing such notes was considered though unsigned by the judge. Chose v. Vandergrift, 88 Penn. St. 217.

Another court of last resort, while holding that an ex-judge may authenticate a bill in a case tried before

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him, holds also that, if he dies before doing so and there is no dispute about the truth of the bill, his successor may authenticate it to prevent a failure of justice. Wheeler v. Fick, supra; Conway v. Smith Mercantile Co., 6 Wyo. 327. That court lays stress on the circumstance that no question is made about the accuracy of the bill, and, we think, rightly.

In the case at bar, it has not been suggested that the bill of exceptions is either false or incomplete, but, instead, the appellants accept its recitals as full and correct; and it is reasonable as well as according to the spirit and command of the code to be liberal rather than technical in matters of practice when liberality will achieve justice and narrowness defeat it. While there is some strength in the argument that a solemn act like signing a bill of exceptions ought not to be performed by a person who has ceased to be an official and is not under official responsibility, there is no substantial merit in the view that it can not be performed by a judge who is still in office, although his territorial jurisdiction may have been so changed before he signed the bill as to no longer contain the bailiwick in which the cause was tried; which is the state of facts presented in this case.

Recurring to our statute on the subject (sec. 731) it is apparent that said statute does not in terms embrace an instance like the one before us, though perhaps susceptible of being held to embrace it without violence to the language used or the intention of the Legislature. But that section must be construed in connection with all other provisions of the statute *in pari materia* and the decisions construing them, and with regard to the functions of bills of exceptions.

If Judge Fort had gone out of office before he signed the present bill, said section would be plainly applicable. He had not, however, but was still occupying the same office he had theretofore held, namely, judge of the Twenty-second judicial circuit, from which circuit Carter county had meanwhile been taken. The judges of the circuit courts are officers of the several judicial circuits of the State and one of them does not

cease to be an officer because of a change in the counties composing his circuit, but only by the total abolition of the circuit. Const. of Mo., art. 6, sec. 24.

We must consider too, the rule that if a special judge is elected to try a cause, or a judge is called in to hold a term of court in a county not in his circuit, the authority of either of those officers to sign bills of exceptions in a case tried by him continues after the term when he was chosen or requested to serve and until the final disposition of the case. R. S. 1899, secs. 1678, 1682; State v. Davidson, 69 Mo. 509; State v. Sneed, 51 Mo. 592; State ex rel. v. Wofford, 111 Mo. 526. It was held in the case last cited that a special judge may be elected to sign a bill of exceptions, if the judge who heard the trial has gone out of office and his successor is disqualified to sign as provided in section 731, supra, because he was of counsel in the case. Judge Fort could have been called in by Judge Evans to hold a term of the Carter Circuit Court and when holding it could have signed the present bill if presented to him within the time limited, as he could transact any other business which came before said court while he was presiding. This being true, and inasmuch as the time for filing the bill had been extended into the vacation of court, we think it would be highly technical to hold that he was without power to sign it and that Judge Evans was the one to sign although he knew nothing about the exceptions, while Judge Fort knew all about them and was still in office.

We rule, therefore, that the bill of exceptions was properly authenticated by the signature of Judge Fort, without ruling that it would have been invalid had Judge Evans signed it.

2. A prerequisite to obtaining relief from a court of equity against a judgment entered by a court of law of competent jurisdiction in a proceeding regular on its face is, that the party applying for relief shall show prima facie he had a meritorious defense to the demand on which the judgment was obtained. Mott v. Bernard, 97 Mo. App. (St. L.) 265; Sauer v. Kansas City, 69 Mo.

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46. But while this showing is indispensable it does not of itself entitle the complainant to relief. Some basis for the exercise of equity jurisdiction must also be established; as that said party was prevented from making a defense to his adversary's cause of action by accident, mistake or fraud. Shelbina Hotel Ass'n v. Parker, 58 Mo. 327; Smoot v. Judd, 161 Mo. 673. In the last case it was said:

"If a person *sui juris* is sued and brought regularly into court by process to answer a petition that states on its face a good cause of action, though he may have a good defense, yet if he omits to plead it, or if he pleads it yet fails to sustain it by proof, and the judgment goes against him, his defense is extinguished in the judgment and can not afterwards be set up against it."

These plaintiffs may have possessed a perfect defense to Yancey's action on Patterson's bond as sheriff, and that defense may be apparent on the face of the pleadings in said action, yet without additional equity they can not have the judgment against them enjoined. To have that done they must show both that they had a meritorious defense and that by some mischance or misconduct unmixed with negligence or inattention of their own or their counsel, they were prevented from interposing it; otherwise, the only method by which they could escape the force and effect of the judgment was by appealing to a court of last resort or suing out a writ of error. Hamilton v. McLean, 139 Mo. 678; Fears v. Riley, 148 Mo. 49.

Appellants say the pleadings in the action on the bond show Yancey's cause of action was barred, when begun, by the statute of limitations; and without deciding the point, we state that if this argument is sound it affords no ground for enjoining the judgment, for this reason if for no other; a writ of error could have been procured and the question tested on appeal without a bill of exceptions as the fact appears, if at all, in the record proper. To successfully maintain the present suit it is incumbent on the appellants to establish an equity in their favor by showing judgment in the other

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action was rendered for Yancey because some accident or mistake, for which they were blameless, precluded them from defending against his claim when they would otherwise have done so successfully, there being no contention that actual fraud was practiced by Yancey.

A judgment entered in an action without notice to the defendant is a nullity, for one must have his day in court. Smith v. Ross, 7 Mo. 463; Roach v. Burnes, 33 Mo. 319. And that a defendant was not notified or summoned may be shown in a direct proceeding to set aside the judgment by evidence *aliunde* the return of the officer on the writ of summons and even to contradict his return. Smoot v. Judd, supra. Parol testimony was admissible to prove the mistake made by the clerk of the circuit court of Ripley county in filling out the copies on the writs of summons for December instead of for April, when the next term of the circuit court was to convene.

But that mistake could have had no influence on the action of any of the defendants except Ponder and Dalton, for it is admitted the others appeared and answered Yancey's petition at the April term. So far as Ponder is concerned, all that is proven is that he did not personally engage Mabrey to act as attorney for him, which was testified to by Mabrey himself. But McCullom and Crowder were also attorneys representing the defendants in the bond case and Crowder was the one whom they engaged, Mabrey coming into the case at Crowder's request to assist in the defense. There was no testimony from either Crowder or Ponder that the answer filed and the other steps taken in behalf of Ponder were unknown to or unauthorized by him. Neither of those persons was put on the stand and it is certainly a significant circumstance that Ponder's testimony as to the authority of the attorneys to represent him was not taken, as that issue of fact was vital.

The rule now is that the party for whom an attorney assumed to act in a cause may, in a proceeding to set aside the judgment therein, question the attorney's authority. Marx v. Fore, 51 Mo. 70; Eager v. Stover, 59

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Mo. 87; Smoot v. Judd, supra; Wiley v. Pratt, 23 Ind. 628; Wright v. Andrews, 138 Mass. 149; Chicago, etc., Ry. Co. v. Hitchcock County, 60 Neb. 672; Dormitzer v. Loan Ass'n, 23 Wash. 132. But to have a judgment set aside for the reason that an attorney's appearance was unauthorized, the party denying the authority must make positive proof that it was lacking. Reynolds v. Fleming, 30 Kas. 106; 1 Black on Judgments, sec. 272. Indeed, some courts still refuse to allow an attorney's right to appear, to be disputed, but remit the injured party to an action against him if his appearance was unwarranted for whatever damage may have been sustained by his assuming authority when he had none. The evidence introduced in behalf of Ponder in the present case to show that neither Mabrey, McCullom nor Crowder was entitled to represent him or enter his appearance to Yancey's suit on the bond, is entirely too weak for us to sustain his bill on that ground; in fact, no showing is made at all except the testimony of Mabrey that Ponder never spoke to him on the subject, but that Crowder did. That an attorney who files a pleading or otherwise acts for a party in a case is entitled to do so is presumed in every jurisdiction and the only difference in the decisions is whether that presumption is conclusive or rebuttable. 1 Black on Judgments, supra. It is only prima facie in Missouri and may be rebutted; but was certainly not rebutted in this case as to the right of McCullom and Crowder to represent Ponder.

Dalton's situation is more favorable, because the copy of the summons delivered to him shows he was commanded to appear at the December term of the Ripley Circuit Court and there was no such term. He swears positively that he never spoke to any person to represent him but, as he had ample time between the date when he was served and the date when he was to appear, intended to go to Doniphan, the county seat of Ripley county, in December and engage counsel; nor is there any positive testimony to weaken or impeach what Dalton stated. It is rather strange that he should not

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discuss the action brought against him with the other defendants nor co-operate with them, nor have any knowledge that the circuit court of Ripley county held no term in December, but did hold terms in April and November. Still, as he so testified and as his testimony is wholly uncontradicted and is corroborated by Mabrey to the extent that Dalton never spoke to him nor engaged him, we do not feel like rejecting it as false. It is certain that he was notified to appear at the wrong time and extremely uncertain that he authorized an appearance for him in April; hence, the judgment against him rests on so weak a foundation that we think he ought to be relieved and allowed to make a defense to Yancey's action, if he has one.

The next inquiry is as to the effect of the statement of Campbell, the clerk of the Ripley Circuit Court, to Mabrey and Moore that he would not send the transcript of the case until the costs had been paid by Yancey and the right of the answering defendants and their counsel to rely on that statement. As to this matter it is perfectly clear that the defendants or their counsel were negligent and that the statement of the clerk could not warrant them in failing to follow the case to Carter county and be present when it came on for trial at the September term. Equity aids the vigilant and not the inattentive, and this maxim is nowhere more rigorously applied than in suits to set aside judgments at law. A party who fails to make his defense to an action at law and then seeks the intervention of a court of equity must not only show some ground for equitable relief, such as fraud, accident or mistake, but must show that he himself was not guilty of any lack or diligence and that he did all that could reasonably have been expected of him. Yantis v. Burdette, 3 Mo. 457; Reed v. Hansford, 37 Mo. 197; Payne v. O'Shea, 84 Mo. 128; Carolus v. Koch, 72 Mo. 645; Shelbina Hotel Ass'n v. Parker, supra. Nor will a party be relieved on account of inattention or negligence of his counsel, unless it was caused by some misconduct of the

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adverse party. Miller v. Bernecker, 46 Mo. 194; Bosbyshell v. Summers, 40 Mo. 172; Bauman v. Field, 9 Mo. App. 576; Crim v. Handley, 94 U. S. 652; Trustees of Amherst College v. Allen, 165 Mass. 178.

Our statutes in regard to changes of venue in force when the change was taken in the case brought by Yancey, required the clerk of the Ripley Circuit Court to make out a transcript of the record immediately after the order for the change of venue was made and transmit the same, duly certified, to the clerk of the Carter Circuit Court under a penalty of one hundred dollars to the aggrieved party for failure to do so. R. S. 1899, sec. 825. They also provided that the party applying for the change should pay the costs attendant thereon and if he failed to pay within fifteen days after the change was granted, a fee bill could be issued against him and his sureties. R. S. 1899, sec. 828.

As it was the duty of the clerk of the circuit court of Ripley county when the change of venue was granted to forthwith send the transcript to Carter county, so it was the duty of the defendants in said cause and their attorneys to follow the case to the Carter Circuit Court, whither it was sent at their suggestion, and be present when it was called for trial there; for they were bound to know the law in the matter and govern themselves accordingly. Besides, Yancey may have paid the costs after Campbell made the statement which is credited to him. At all events, these appellants and their counsel are not excusable for relying on Campbell's assertion that he would not send the transcript until payment was made. Lack of vigilance and care on the part of the appellants appears from their own testimony, whereas it is incumbent on them to make a showing of thorough diligence in order to be relieved.

Setting aside judgments is an act which courts of equity are chary about doing, while the standard of good faith and activity to which the party applying for the remedy is required to show his conduct conformed before his prayer will be granted, is a high one, and

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the conduct of all the appellants except Dalton fell far short of that standard.

3. In granting Dalton relief it is not necessary, according to the later decisions of the Supreme Court, to reverse the judgment entered in this case as to all the appellants. The doctrine that a judgment is an entirety so that if annulled, reversed or set aside as to one party, it must be reversed or set aside as to all, no longer obtains except when, from the nature of the liability of the parties, it can not be justly allowed to stand as to some and be annulled as to others. Christopher, etc., Co. v. Kelly, 91 Mo. App. (St. L.) 93, and cases cited therein. The liability of these appellants on the sheriff's bond was joint and several, so that Dalton might have been sued alone, or the other appellants might have been sued and he left out. The judgment in the action on the bond may, therefore, be set aside as to him and upheld as to the other appellants. This was expressly decided by the Supreme Court in a similar litigation. State ex rel. Ozark County v. Tate, 109 Mo. 265.

The judgment of the court below in the present suit dismissing the appellants' bill is affirmed against all the appellants except Dalton, as to whom the respondents enter an agreement that the judgment in the other cause may be set aside. *Bland, P. J.*, and *Reyburn, J,* concur.

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By M. R. SMITH.

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3. CONVERSION: PRACTICE, TRIAL: ANSWER: PLEADING AND PROCEDURE. Where, in an action for conversion of a stock of goods which defendants purchased and delivered to plaintiff's intestate, under a conditional bill of sale, defendant in his answer construed such instrument as a chattel mortgage, he could not, without amending his pleading, take a different position on the trial. Bower v. Bower, 674.

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2. Denial of liability. The insurer at all times denied that the assured's cattle had been killed by lightning. *Held*, this was a denial of liability in toto and the court had jurisdiction to settle the liability, notwithstanding an arbitration clause in the policy. Ib.

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2. What sufficient to constitute. The defendant came, in the absence of the family, to the house where the prosecutrix was serving as a domestic and asking for a drink followed her into the kitchen, and after asking her some more or less significant questions, placed his left hand over the door and his right hand upon her arm. Thereupon she jerked loose and ran through the dining-room and hall up stairs—he following to the stairway. *Held*, sufficient to constitute an assault. (Cases considered.) Ib.

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2. EXPERT TESTIMONY: INSTRUCTION: HARMLESS ERROR: PRACTICE, APPELLATE. Where, in an action for attorney's services, the court charged that, if they should find such a sum as, considering all the circumstances, they believed was the reasonable value of his services, error in refusing an instruction that the jury were not bound by the testimony of experts as to the value of such services, was harmless. Ib.

ATTORNEY AT LAW.

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DEPOSITS: DEBTOR AND CREDITOR: GARNISHMENT. Certain money was deposited in a bank to the credit of L. L. who drew his check for the amount in favor of S. This was done at the request of M., who was a surety of L. to S., and M. took the check to the bank and requested it credited to the account of S., which was done. L.'s account being charged therewith. Subsequently L.'s creditor sued him by attachment and garnished the bank. *Held*, that on the deposit the bank became the creditor of L. and on the presentation of L.'s check and charging his account therewith L.'s interest in the funds ceased and the bank became the debtor of S., or if S. refused to accept, of M. and plaintiff's garnishment must fail. Young v. Bank of Princeton, 576.

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BILLS AND NOTES.

1. TRANSFER: INDORSEMENT: EVIDENCE: PLEADING AND PRACTICE: ERROR. In an action by an indorsee on a negotiable promissory note, where it was denied that plaintiff was a bona fide purchaser for value, the admission of the indorsement of the payee in evidence without proof if its authenticity, over defendant's objection was error. Hugumin v. Hinds and Weissgerber, 346.

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3. ACTION: NEGOTIABLE NOTE: INDORSEE: INNOCENT HOLDER: EVIDENCE: JURY: PRACTICE, TRIAL. Where, in an action on a negotiable note for $150 by an indorsee, it was denied that the plaintiff was an innocent holder for value, and plaintiff as part of his case, testified to his purchase of the paper, and that he had paid $100 therefor, during the month of January, 1899, by a check on a certain trust company, and made no previous inquiry as to defendant's standing, and had no talk or understanding with the payee as to the collection of the note, the question of the credibility of his evidence as to the indorsement of the note to him was for the jury. Ib.

4. BILL OF EXCEPTIONS: TIME OF FILING BILL OF EXCEPTIONS: PRACTICE, TRIAL. Where a statement of the circuit clerk, setting forth the record of an appeal, recited that "on the seventeenth day of April, 1901, defendants filed their bill of exceptions in this cause," after which followed the bill of exceptions, and at the close of the transcript the clerk certified that the foregoing was a true and complete copy of the judgment, motion for a new trial, affidavit for appeal, and "all orders and motions affecting the same, in the case," the record contained a sufficient showing of the filing of the bill of exceptions. Ib.

5. PRACTICE, APPELLATE: PRESUMPTIONS: ADJOURNMENT OF COURT. Where nothing in the record intimated that the court adjourned for the term before the bill of exceptions was filed, the appellate court will not presume an adjournment in the absence of any such showing. Ib.

6. MOTION FOR NEW TRIAL: CONTINUANCE: PRACTICE, TRIAL; PRACTICE, APPELLATE. The rule is that a continuance of a motion for a new trial will be presumed in support of the regularity of the trial court's action in the premises. Ib.

BOND. See SURETY.

1. CONDITIONS: CONTRACTS: SURETY: SURETY COMPANY. A bond of a surety company was conditioned that if the principal, a corporation, "shall in any manner or by any means, misuse, misappropriate, or misapply said paper or plates," to be furnished by the obligee, "or in any manner dispose of the same, or convert them to their own use, amounting to larceny or embezzlement of paper or plates, then this bond to be of full force." The principal appropriated to its own use a large amount of paper furnished by the obligee, and in an action on the bond the surety claimed that, as a corporation could

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not commit larceny or embezzlement, the surety was not liable. *Held*, that the effect of the bond was to raise a liability in two contingencies: first, if the principal should in any manner misappropriate or misapply the paper; and, second, if it should in any manner, amounting to larceny or embezzlement, dispose of the same or convert it to its own use. N. K. Fairbank Co. v. Am. Bond & Trust Co., 205.

2. Plaintiff contracted with a printing company to print certain wrappers or plates, and with paper to be furnished by plaintiff. The company furnished a bond to indemnify plaintiff against loss by the misappropriation or misuse of any part of the paper or plates so furnished. As each lot of paper was delivered a written agreement was entered into by plaintiff and the company, whereby it acknowledged the receipt as bailee of the paper then delivered, and agreed to print and restore the identical paper as wrappers to the plaintiff as ordered, and, so long as any of the paper remained in such company's possession, it continued to be the property of plaintiff. Before making such auxiliary agreement the attorney in fact of the surety on the bond was notified thereof, and asked if he had any objection to the form and conditions therein contained, and he answered that he had not. *Held*, that the original contract was not changed, nor the responsibility of the surety increased, by such auxiliary agreements, and the surety was not relieved thereby. Ib.

BREACH. See CONTRACT, 17; INSTRUCTION, 3; PLEADING, 2.

BUILDING AND LOAN ASSOCIATION.

1. COMPETITIVE BIDDING: PREMIUM: USURY. Where there is no competitive bidding for preference of a loan, the statute on building and loan associations does not protect the loan from the vice of usury. Magee v. Verity, 486.

2. USURY: PARTICIPATION: SETTLEMENT. Where a borrower settles with the association and receives a part of the money earned by his and other usurious contracts, he is bound by such settlement and can not plead usury in his own contract. Ib.

3. SETTLEMENT: FRAUD. Where there is no fraud in obtaining the signature of the maker to a settlement, he will not be permitted to show that such paper does not contain the contract. (Crim v. Crim, 162 Mo. 544, followed.) Ib.

4. FRAUD: SIGNING UNREAD CONTRACT. Mere falsely representing to a man in possession of his faculties and able to read, that a writing involves the verbal understanding of the parties, is not the fraud which will set aside a contract. Ib.

5. SETTLEMENT: ABANDONMENT. If a settlement has been abandoned and never recognized by the parties thereto, it is of no force. Ib.

BOYCOTT. See MONOPOLIES, 1, 2, 3.

BURDEN OF PROOF. See ACTION, 2; DAMAGES, 10.

CAR. See COMMON CARRIER.

CARE. See DAMAGES, 7.

CATTLE. See EVIDENCE, 20.

CAUSE OF ACTION. See FEES, 1.

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CERTIFICATE OF TITLE. See INSURANCE, 18, 19, 20.

DEFECTS: LIABILITY OF TITLE COMPANY: LIS PENDENS: INSTRUCTIONS: ERROR: PRACTICE, TRIAL. On an application to plaintiff to make a mortgage loan, he applied to defendant for a certificate of title, which defendant furnished. It omitted a notice of *lis pendens* in an action in which the borrower's title was afterwards defeated. Plaintiff made the loan, and alleged that he loaned $160, and that all but $35 was paid when the trust deed was foreclosed. The answer denied that any money was loaned. At the trial plaintiff produced the borrower's notes amounting to $160 and testified that he loaned her the full amount. Her husband testified that he negotiated the loan and that only $125 was actually loaned. The court declared the law to be that if, before advertisement was begun of the sale under the deed of trust, all the money loaned had been repaid, the verdict must be in favor of defendant. *Held*, that, though the instruction was faulty in omitting plaintiff's right to interest, as he had alleged in his petition that all but $35 had been paid, and, if so, he had received more than $125 and interest, he was not prejudiced by such error. Dyer v. St. Louis Trust Co., 177.

CHANGE OF VENUE. See JUSTICES' COURTS, 2, 3.

1. BILL OF EXCEPTIONS: WHO SHALL SIGN: JUDGE: AUTHORITY TO SIGN BILL OF EXCEPTIONS. Where a change of venue was granted, and the cause tried by the judge of the circuit of the county to which the change belonged, and after the denial of a new trial, and before the expiration of the time fixed for the filing of the bill of exceptions, such county was taken out of the circuit presided over by the judge who tried the cause, and attached to another circuit, such fact did not deprive the judge trying the cause, who still remained in office, of jurisdiction to settle and sign the bill of exceptions. Patterson v. Yancey, 681.

2. ACTION TO RESTRAIN COLLECTION OF JUDGMENT: PLEADING: JUDGMENT BY DEFAULT: STATUTE OF LIMITATIONS: APPEAL: WRIT OF ERROR. A suit to restrain the collection of a default judgment can not be maintained on the ground that the pleadings showed that the action was barred by the statute of limitations, such objection being available by appeal or writ of error. Ib.

3. DUTY OF PARTIES: JUDGMENT BY DEFAULT: STATUTORY CONSTRUCTION. Section 825, Revised Statutes 1899, provides that, after a change of venue, the clerk shall transcribe all the record immediately, and transmit it to the clerk of the circuit court to which the change is granted, under the penalty of one hundred dollars to the aggrieved party for failure to do so, section 828, Revised Statutes 1899, provides that the party applying for the change shall pay the costs, which, if he fails to do within fifteen days, a fee bill may be issued against him and his sureties. *Held*, that, where a change of venue was granted on plaintiff's application, a statement by the clerk to defendant's attorneys that he would not remit the transcript until the costs had been paid, was no excuse for their failure to appear at the next term of court to which the change was granted, so as to entitle defendants to restrain the collection of a default judgment obtained at such term for their failure to appear. Ib.

CHARTER. See ASSESSMENTS; MUNICIPAL CORPORATIONS, 6.

CHATTEL MORTGAGE. See EVIDENCE, 9; REPLEVIN, 1, 2, 3.

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1. FORECLOSURE: RIGHTS OF MORTGAGEE. A mortgagee in an overdue chattel mortgage may maintain replevin for the mortgaged goods without foreclosure. Western Realty Co. v. Musser, 114.

2. DESCRIPTION: EVIDENCE. The description in a chattel mortgage should be so definite that a third person by its aid, together with the aid of the inquiries it suggests, may identify the property; and a description noted in the opinion is held insufficient to warrant the admission of the mortgage in evidence. Young v. Bank of Princeton, 576.

CHECK. See CONTRACT, 3.

CHILDREN. See DIVORCE, 1, 2, 3; PARENT AND CHILD.

CIRCUIT COURT. See APPELLATE COURTS; JUSTICES' COURTS, 1; RES ADJUDICATA, 2.

CITIES, TOWNS AND VILLAGES. See MUNICIPAL CORPORATIONS, 8.

1. PUBLIC SEWER: ORDINANCE: USER. A city by resolution (not an ordinance) established a public sewer and borrowed money and paid for the construction of same, and accepted and used same as a public sewer. Held, these acts made it a public sewer as if it had been originally established by ordinance. Akers v. Kolkmeyer, 520.

2. *Held*, likewise, if accepted and used by the city it would become a public sewer though built by private contributions. Ib.

3. RATIFICATION: ESTOPPEL. While a subsequent ratification in proper form of such a sewer might estop the city, yet it could not estop a private citizen, and in a controversy between such citizen and others as to whether it were a public sewer, such ratification need not be pleaded, but may be shown in evidence to establish the fact that it was a public sewer. Ib.

4. DIMENSIONS AND MATERIAL OF SEWER: SPECIFICATIONS. A city by ordinance adopted a general sewer system with maps, profiles, plans and specifications then on file. By another ordinance it provided that all sewer work should be done in accordance with such plans and specifications. It then established a sewer district and ordered the construction of a sewer therein. *Held*, the dimensions and material for the district were sufficiently indicated by the plans and specifications of the general ordinance. Ib.

5. SEWER DISTRICT: NECESSITY OF. When a city council has power to create a sewer district and issue taxbills therefor, its acts in so doing are, in the absence of fraud, conclusive upon the courts on all questions relating to the necessity and sanitary propriety of such sewer. Ib.

6. SEWER TAXBILLS: ENGINEER'S REPORT: FILING. The report of an engineer under review is *held*, while lacking in form, to be substantially sufficient to authorize special assessments, and is found to have been filed in fact though not so marked, which omission can not affect its validity. Ib.

CLAIM. See DAMAGES, 3; SCHOOLS.

CLERK. See MISTAKE.

CODE. See EVIDENCE, 12.

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COMMISSIONER. See PRINCIPAL AND AGENT, 2.

TO TAKE DEPOSITIONS. A commissioner to take depositions, appointed as stated in the case at bar, may be allowed by the court reasonable compensation, although no express statutory provision so declares. Paxson v. MacDonald, 165.

COMBINATION. See POOLS AND TRUSTS, 4.

COMMISSIONS.

EVIDENCE. Where the evidence tends to prove that plaintiff, in an action for commissions for the sale of real estate, set on foot inquiries and negotiations that finally culminated in the sale of the real estate; that the plaintiff brought the buyer and seller together, he is entitled to his commissions. Cunliff v. Hausman, 467.

COMMON LAW. See PETITION, 2; POOLS AND TRUSTS, 6.

COMMON CARRIER. See TESTIMONY.

RATES: NARROW AND STANDARD-GAUGE CARS: INSTRUCTION. Plaintiff, with knowledge of an agreement existing between connecting carriers, that three narrow-gauge cars of the one should be equivalent to two standard-gauge cars of the other in fixing the rates, shipped his stock over the narrow-gauge route to a point on the standard-gauge road. *Held*, on the evidence, that the rate thus calculated did not exceed the joint tariff rates of the carriers, and an instruction set out in the opinion is approved. Carlisle v. Mo. Pac. Ry. Co., 571.

COMPENSATIONS. See GUARDIAN AND CURATOR, 1, 2.

COMPETITIVE BIDDING. See BUILDING AND LOAN ASSOCIATIONS, 1.

COMPETITION. See POOLS AND TRUSTS, 1.

CONDITIONS. See BOND, 1, 2.

CONDITION PRECEDENT. See ARBITRATION AND AVOWAL, 1.

CONDUCTOR. See EVIDENCE, 7.

CONSIDERATION. See ACTION, 1; CORPORATIONS; PROMISSORY NOTE, 1.

CONSTITUTION. See MORTGAGE AND DEED OF TRUST, 4, 5, 6.

COURT OF APPEALS: SUPREME COURT: PRACTICE, APPELLATE. The Constitution makes it the duty of the Courts of Appeals of Missouri to follow the last controlling decision of the Supreme Court. Gebhart v. St. Louis Transit Co., 373.

CONSTRUCTION. See ASSESSMENTS; CONTRACTS, 9, 18, 19; EVIDENCE, 12; INTEREST; MORTGAGE AND DEED OF TRUST, 4, 5; MUNICIPAL CORPORATIONS, 6.

CONSTRUCTION OF CHARTER. See MUNICIPAL CORPORATIONS, 15, 16.

CONSTRUCTION OF CONSTITUTION. See MORTGAGES AND DEEDS OF TRUST, 4, 5.

CONTINGENT FEE. See FEES, 1.

CONTINGENT FUND. See SCHOOLS, 1.

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CONTRADICTION. See EVIDENCE, 5.

CONTRACT. See AGREEMENT, 3, 4; BOND, 1, 2; BUILDING AND LOAN ASSOCIATIONS, 4; FEES, 1; INSTRUCTIONS, 3; INTEREST; INSURANCE, 1; PLEADING, 2; POOLS AND TRUSTS, 1, 2, 3, 4, 5, 6, 7; SCHOOLS, 2; TENANTS-IN-COMMON, 1, 5; TRUST AND TRUSTEES, 2, 3, 4, 5; WAREHOUSEMAN.

1. IMMORAL: PLEADING: EVIDENCE. Where the pleading alleges a contract and the answer is a general denial and the contract itself shows no illegality on its face, the court can not consider an unpleaded defense even though it develop in the evidence. Gibson & Bro. v. Jenkins, 27.

2. IMMORAL: PLEADING: EVIDENCE. Where the petition counts on a contract fair on its face and the answer is a general denial, and evidence tending to establish a defense that is *new matter* is without objection admitted, there is no waiver of the failure to plead the new matter. Such waiver occurs only where the unpleaded defense developed by the admitted testimony is not new matter. (Cases considered.) Ib.

3. ACCEPTANCE OF CHECK: INSTRUCTION. Where a party accepts, indorses and cashes a check containing certain recitals as to its application, the check becomes prima facie evidence of the payment and its purpose, and an instruction to that effect and placing the burden of proof on the payee to show that the payment was not as recited in the check, is approved. Gregg v. Land & Mining Co., 44.

4. EXCHANGE OF LAND: STATUTE OF FRAUDS. A contract for the exchange of land for bank stock was alleged by plaintiff. In support of the allegation he offered certain written memoranda described in the opinion, and the court held them insufficient under the statute of frauds. Beckmann v. Mepham, 161.

5. A contract required by the statute of frauds to be in writing can not be enlarged by oral agreement so as to make the amendment enforcible when the statute is interposed. Ib.

6. A contract for the exchange of land for land or other things than money, is within the statute of frauds governing the sale of lands. Ib.

7. STATUTE OF FRAUDS. If a part of an entire contract is within the statute of frauds, the whole is controlled by it. Ib.

8. PLEADING AND PRACTICE. The statute of frauds may be used as a defense under a general denial to a petition upon a contract, where the petition does not allege the contract to be oral, and the statute is invoked at the trial in some appropriate way. Ib.

9. CONSTRUCTION OF: RULE. A contract should be so construed in full scope and purpose as not to give an unfair advantage to either party to the contract. Laclede Power Co. v. Stillwell, 258.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS. In the case at bar, the defendant by making an assignment and dispossessing itself of all its assets rendered itself unable to comply with the contract and thereby committed a breach of it. Ib.

11. UNLIQUIDATED DAMAGE: ASSIGNED ESTATE: PRACTICE AND PLEADING. Unliquidated damages, for breach of contract made by an assignor to a deed of voluntary assignment for the benefit of creditors, may be proved up against the assigned estate. Ib.

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12. STATUTE OF FRAUDS: PLEADING: PRACTICE, TRIAL. Where a contract within the purview of the statute of frauds is alleged, and is not stated to be oral, the allegation will be taken to mean that the contract was valid in respect of form. Walker v. Cooper, 441.

13. GENERAL DENIAL. And a general denial which puts in issue the making of the contract will suffice as a foundation for utilizing the statute of frauds as a defense, but the trial court must be made aware, in some distinct manner, that the party relies on that defense. Ib.

14. PRACTICE, APPELLATE. And where the case goes to judgment without an expression of intent to invoke that statute, it can not be availed of upon appeal in the appellate court. Ib.

15. TENDER. Where a party absolutely refuses to perform a contract, a tender by the other party is unnecessary. Ib.

16. ERROR. When, in an action for breach of contract of sale of tobacco by sample, the seller refused to perform, and admitted he could not furnish the lot sold, the admission of evidence of a custom in the trade whereby purchasers of tobacco by sample were allowed to inspect the goods before paying for them, was harmless. Ib.

17. BREACH OF: EVIDENCE: HARMLESS ERROR. Where an action for breach of contract of sale was tried by the court, and the court fixed the damages according to the market price of the commodity at the place provided for delivery, the admission of evidence of the market price at the point to which the property was to be shipped was harmless. Ib.

18. SEWER BUILDING: CONSTRUCTION: TIME OF PERFORMANCE: RATIFICATION. The contract for the construction of a sewer was awarded June 24 and executed on July 20 thereafter. Work began on August 8. On September 9 the city council formally ratified everything done in pursuance of the contract, as of the date of the award. *Held*, the council had power to ratify the contract but not to change its terms, and if the ordinance is to be construed as ratifying what was done under the contract, the time for performance should be computed from the date of commencing work, and an excess of four days is not unreasonable and can make no difference. Boulton v. Kolkmeyer & Co., 530.

19. *Held*, further, that if the contract did not go into effect until the ratification, the work was completed within the contract period. Ib.

CONTRACTOR. See GRANTOR; MECHANIC'S LIEN; NEGLIGENCE, 10, 11, 12.

CONTRADICTION. See EVIDENCE, 16.

CONTRIBUTORY NEGLIGENCE. See DAMAGES, 8; MASTER AND SERVANT, 15; NEGLIGENCE, 5, 7, 16, 17, 18; RAILROADS, 2.

TESTIMONY: EVIDENCE. Where plaintiff, injured by a street car at a crossing, testified that he could not see the car on account of an obstruction, and that he did not hear it, it was proper to submit the issue of contributory negligence to the jury, though other witnesses, similarly or not so advantageously situated, testified that they saw the car one hundred and fifty feet away. Gebhart v. St. Louis Transit Co., 373.

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CONVERSION. See EVIDENCE, 9.

CORPORATIONS.

REPORTS: FAILURE OF CORPORATION TO FILE REPORT. The duty of instituting proceedings to recover the fines and penalties provided for if corporations do not make the report to the Secretary of State as required by sections 1013 and 1017, Revised Statutes 1899, rests on the prosecuting attorney of the county where the company is located, or, if in the city of St. Louis, on the circuit attorney, and the proceedings should be in the name of the State at the relation of the county, or of said city. State ex rel. v. Missouri Exploration & Land Co., 226.

COSTS. See DENIAL; FALSE IMPRISONMENT, 3; PRACTICE, TRIAL, 3.

COUNT. See PETITION, 1; PRACTICE, APPELLATE, 1; PRACTICE, TRIAL, 1, 11; REFEREE, 2.

COURT OF APPEALS. See CONSTITUTION; JUDICIAL NOTICE.

COURTS. See APPELLATE COURTS; ARBITRATION AND AWARD, 1; BILLS AND NOTES, 5; CONSTITUTION; EVIDENCE, 6, 14; GUARDIAN AND CURATOR, 2, 4; JURY, 1.

COUNTERCLAIM.

CONVERSION. See ACTION, 3.

1. EVIDENCE: INSTRUCTION: ERROR: PRACTICE: TRIAL. Where, in an action for conversion, it appeared that defendant purchased and paid for a stock of goods for his son (plaintiff's intestate) under the agreement that his son should pay him by a certain date, and if the son failed to do so, the agreement should be void, and the goods be turned over to defendant as his property, and there was evidence that the son paid nothing, and turned the goods over to defendant, an instruction that, though the defendant furnished the money, yet this gave him no right to the property as to take possession thereof, was error. Bower v. Bower, 674.

2. In the case at bar, there being evidence that the son turned the goods in question over to defendant, and that he was in possession for several months before the son's death, an instruction which assumed as a fact that defendant took possession of the goods after his son's death, was error. Ib.

CREDITOR. See BANKS AND BANKING; CONTRACT, 10.

CRIMINAL LAW.

1. CRIMINAL PRACTICE: DISQUALIFICATION OF TRIAL JUDGE: STATUTORY CONSTRUCTION. The regular judge of a circuit court, under the provisions of section 2597, Revised Statutes 1899, has a right to decline to preside at the trial of a case for any of the causes mentioned in section 2594, if he is conscious of the existence of any cause which disqualifies him. State v. Gilham, 296.

2. AGREEMENT TO SELECT SPECIAL JUDGE. The right given the defendant and prosecuting attorney, with the approval of the court, to elect some attorney at law by agreement in writing is permissive only. and in the absence of a showing to the contrary, it will be presumed the right was not exercised. Ib.

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CRIMINAL PRACTICE. See CRIMINAL LAW, 1, 2; JUDGE, 1, 2.

CROSS-BILL. See DIVORCE, 4.

CRUEL TREATMENT. See DIVORCE, 4.

CURATOR. See GUARDIAN AND CURATOR.

DAMAGES. See BAILMENT; CONTRACT, 11; INSTRUCTIONS, 2; JUDGMENT; PASSENGER CARRIERS, 1, 2, 3, 5, 6; STREET GRADING, 1, 2; TRUSTS AND TRUSTEES, 1.

1. EVIDENCE: REMITTITUR: NEW TRIAL. Where, in an action to recover of a warehouseman for goods partly destroyed and partly injured by fire, there was no evidence as to the value of the goods destroyed, and the evidence was conflicting as to the damages to those injured, there is no basis on which to fix the amount which should be remitted from a verdict which largely exceeds any evidence as to the amount of damage to the injured property, and a new trial should be had. Kennedy v. Portman and Woempner, 253.

2. VERDICT: EVIDENCE. On the evidence where it is plain that the jury believed the plaintiff's witnesses and not the defendant's, a verdict for seven hundred and sixty dollars for a personal injury on the sidewalk is held not excessive. Fairall v. City of Cameron, 1.

3. CLAIM: PETITION: PROOF: PLEADING AND PRACTICE. A claim for special damages, such as in the incurring of expense to recover property taken, must be specifically assigned in the petition, in order that the defendant may be reasonably advised of the case he is called upon to meet. Patee v. McCabe-Bierman Wagon Co., 356.

4. NEGLIGENCE. A defendant is not liable in every event for the damage caused by his runaway team; but his liability depends on whether or not he took ordinary care to prevent it from running away. Groom v. Kavanagh, 362.

5. The fact that a defendant left a team unattended and unhitched on a public street in a city, is evidence of negligence. Ib.

6. A foot passenger when crossing a traveled thoroughfare of a city must use ordinary care to avoid injury by horses and vehicles. Ib.

7. ORDINARY CARE. Sometimes in order to observe ordinary care, a footman must look or listen, before attempting to cross a street, but he is not required to do so in such an absolute sense that his omission will always and necessarily defeat an action for damages caused by a collision with a horse or vehicle due to the owner's negligence. Ib.

8. CONTRIBUTORY NEGLIGENCE. And in the case at bar, it was for the jury to say whether the plaintiff was negligent, and if so, whether that negligence contributed to cause the accident. Ib.

9. ACCIDENT: LIABILITY. Defendant is not liable to the plaintiff if the casualty was a pure accident, in no way due to the defendant's carelessness. Ib.

10. BURDEN OF PROOF. The burden of proof is on the plaintiff to show the defendant was guilty of negligence which caused plaintiff's injury, and on the defendant to show plaintiff was guilty of contributory negligence. Ib.

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11. ORDINARY CARE. Ordinary care means the degree of care which would be used by a person of common prudence in similar circumstances. Ib.

12. PRACTICE, TRIAL; ERROR: INSTRUCTIONS. It is not error to refuse to give instructions, which had already been given by the court covering the same propositions. Ib.

13. TESTIMONY. Where the testimony of several witnesses tend to show that the defendant left his horses unhitched and unheld while his back was turned to them, he knowing they were spirited horses and had previously ran away, if plaintiff is injured by being run over by said horses running away, this made a prima facie case to go to the jury. Ib.

14. VERDICT, WHEN SET ASIDE: PASSIVE, PREJUDICE: PRACTICE, APPELLATE. Where a trial judge refuses to set aside a verdict which is claimed to be excessive, the appellate court will affirm its action unless it is manifest that the jury were actuated by passion or prejudice. Mitchell v. Wabash Ry. Co., 411.

15. In an inquiry of damages for breach of a covenant for title, evidence showing the effect of a restriction on the power of disposal contained in plaintiff's deed is proper to be considered in measuring damages, and evidence of its effect on the value of the property is admissible. Egan v. Martin, 535.

16. EXCESSIVE VERDICT: EVIDENCE. Where the evidence is conflicting as to the amount of damages and the plaintiff remits a part of the verdict, the appellate court holds the remainder not excessive on testimony. Chaney v. Mo. Pac. Ry. Co., 541.

17. EXCESSIVE VERDICT. A verdict for three thousand dollars, under the evidence in the record, is *held*, not excessive so as to justify the interference of the appellate court, especially since it receives the sanction of the trial judge. Huff v. City of Marshall, 542.

18. MEASURE OF: INSTRUCTION: REFINEMENT. A criticism of an instruction relating to the measure of damages is *held* to be too refined for practical purposes. Hutchins v. Mo. Pac. Ry. Co., 548.

19. TRIAL AND APPELLATE PRACTICE: INSTRUCTION: COVERED IN OTHERS: ABSTRACT. Though an instruction be unobjectionable in form, if it appears to have been covered by other instructions, it is not error to refuse it; and where it summarizes a vast array of facts and all the evidence does not appear in the abstract the appellate court can not review its refusal. Ib.

DEALING. See PRINCIPAL AND AGENT, 1.

DECLARATION. See EVIDENCE, 16.

DEBT. See DURESS.

DEBTOR AND CREDITOR. See BANKS AND BANKING.

DEED OF TRUST. See INJUNCTION, 2; TRUST AND TRUSTEES, 3.

DEFAULT. See CHANGE OF VENUE, 2.

DEFECTIVE SIDEWALK. See MUNICIPAL CORPORATIONS, 2, 3, 4, 5; NEGLIGENCE, 15.

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DEFECTS. See CERTIFICATE OF TITLE.

DEFECT OF PARTIES. See PARTIES, 1, 2.

DEFINITIONS. See SCHOOLS, 1; TERM OF COURT.

The meaning of the phrase "shortest time and space possible" is uncertain, and the incorporation of this phrase in an instruction, without explanation, in a personal injury action against a street railway, is misleading. Gebhardt v. St. Louis Transit Co., 373.

DENIAL. See ARBITRATION AND AWARD, 2; CONTRACT, 13.

STATUTORY CONSTRUCTION: COSTS. Where a party has given notice to take depositions, and a commissioner is appointed under the Missouri statute on the subject, the party at whose instance the depositions are taken is chargeable with the fees allowed by the court to the commissioner; and where the same have been taxed in his favor as costs against the adverse party, but are uncollectible, the party at whose instance the depositions were taken may be held liable for said fees. Paxson v. MacDonald, 165.

DEPOSITIONS. See COMMISSIONER, EVIDENCE, 1.

DEPOSITS. See BANKS AND BANKING.

DESCRIPTION. See CHATTEL MORTGAGES, 2.

DISCRETION. See EVIDENCE, 6.

DISMISSAL. See FALSE IMPRISONMENT, 5.

DISPOSITION. See MORTGAGE AND DEED OF TRUST.

DISTRICT. See SCHOOLS, 2.

DRAMSHOP LICENSE.

1. APPLICATION: AFFIDAVIT: PETITION: EXCISE COMMISSIONER. No affidavit is required to accompany a petition of an applicant for a dramshop license, and an order annulling a license on the ground that an affidavit accompanying the petition was not made by any officer authorized to administer oaths, was erroneous. State ex rel. v. Seibert, 212.

2. All jurisdictional facts to authorize the granting of a dramshop license by the county court or excise commissioner must affirmatively appear on the face of the proceedings. Ib.

3. JURISDICTION: STATUTORY CONSTRUCTION. Under the provisions of section 2997, Revised Statutes 1899, as amended by Act of March 13, 1901, excise commissioners have no jurisdiction to grant a dramshop license until the petition has been on file ten days. Ib.

DIVORCE.

1. MAINTENANCE OF CHILDREN: LIABILITY OF FATHER. Where a decree of divorce is silent as to the custody of children and the father leaves them to the care and nurture of his former wife, his liability for their support and education remains just as before the divorce. (Cases reviewed.) Shannon v. Shannon, 119.

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2. Action. Where after divorce the father abandons his minor children to the care and maintenance of the mother she can compel him to relieve her of such burden, and although the proceeding is in the interest of the children, yet the primary cause of action is in the mother. Ib.

3. Maintenance of children: liability of father: supplemental proceeding. Where parents have been divorced the wife may, after birth of infant, by a supplemental bill open up the decree as to such after-born child, and the court may make all suitable orders for its care, custody and maintenance. Ib.

4. Cruel treatment: evidence: cross-bill. In an action for divorce, tried on evidence raised by defendant's cross-bill charging cruel treatment in shooting at him several times, one ball passing through his body, in which his wife claimed that she did not know him at the time of shooting, though it was broad day-light, and they had lived together twenty-eight years, and he spoke to her, and immediately after the shooting she said she was sorry she had not killed him; evidence examined and *held* that a judgment of divorce in defendant's favor was justified. Torlotting v. Torlotting, 183.

5. Former suit: bar to action. In a suit for divorce by a husband against his wife on the ground of adultery, the evidence tended to show that if she had committed the act he had connived at the adulterous intercourse by arranging for the time and place where the act was committed, and for that reason he was not entitled to divorce. Afterwards she sued for divorce and he filed a cross-bill alleging cruelty since the termination of the first suit: *Held*, that the decision in the first case was no bar to the second suit, providing his conduct had since been of an exemplary character. Ib.

6. Trespass. Where after a husband and wife had separated she continued to live in his house with their two minor children, and a bill was sent to him for some plumbing she had had done, he was not a trespasser in going to the house to examine the work before paying the bill. Ib.

DOMESTIC ANIMALS. See Master and Servant, 13.

DURESS.

Evidence: bona fide debt. Evidence is reviewed and held insufficient to make a case of duress, since there was no threat of arrest—much less of immediate arrest—and the debt is admittedly a bona fide claim. (Cases considered.) Reichle v. Bentele, 52.

DUTY. See Change of Venue, 3; Guardian and Curator, 4; Negligence, 2; Ordinances, Street Railway, 2, 3.

ELECTRIC LIGHT. See Municipal Corporations, 6, 7, 8.

EMPLOYEE. See Negligence, 10, 11, 12, 13.

ENGINEER. See Offices and Officers.

ENTRY AND DETAINER. See Justices' Courts, 1.

EQUITY. See Fees, 3; Fraud, Practice, Trial, 5.

1. Fraud: setting aside judgment: misrepresentations. Equity will vacate a judgment for fraud in the "concoction" thereof, and

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such a fraud may consist in preventing or debarring a party from asserting his rights in the course of a litigation by any deceitful misrepresentations whereby a defense is prevented. Tapana v. Shaffray, 337.

2. ATTACHMENT: GARNISHMENT. Plaintiff brought a bill in equity against defendant and others to follow and reclaim a fund he claimed as his own. He subsequently brought suits by attachment against the other defendants and garnished the defendant bank and other persons. *Held*, by the garnishment proceedings plaintiff abandoned his equitable claim. Young v. Bank of Princeton, 576.

ERROR. See ACCOUNTING; APPEAL BOND; ATTORNEY AND CLIENT, 2; BILLS AND NOTES, 1; CERTIFICATE OF TITLE, CONTRACT, 16, 17; CONVERSION, 1; EVIDENCE, 15, 20, 21; INSTRUCTIONS, 5, 6; NEGLIGENCE, 6; PRACTICE, APPELLATE, 1; PRACTICE, TRIAL, 1, 4; REPLEVIN, 1.

INSTRUCTION; PRACTICE, TRIAL. It is not error to refuse an instruction covered in one given by the court of its own motion.

ESTATE. See ADMINISTRATOR, 1; CONTRACT, 11.

ESTOPPEL. See CITIES, TOWNS AND VILLAGES, 3; INSURANCE, 2; MUNICIPAL CORPORATIONS, 9; PLEADING, 7; PRINCIPAL AND AGENT, 1.

EVIDENCE. See ASSAULT, 1, 2, 3, 4, 5, 6; ATTORNEY AND CLIENT, 1, 2; ATTORNEY AT LAW, BILLS AND NOTES, 1, 2, 3; CHATTEL MORTGAGES, 2; COMMISSIONS, CONTRACT, 1, 2, 17; CONTRIBUTORY NEGLIGENCE, CONVERSION, 1, 2; DAMAGES, 1, 2, 10, 16; DIVORCE, 4; DURESS, FALSE IMPRISONMENT, 1; GUARDIAN AND CURATOR, 3; INSTRUCTIONS, 5; JURY, 1; MUNICIPAL CORPORATIONS, 4, 5; NEGLIGENCE, 1, 9, 18; PASSENGER CARRIERS, 1, 4; PLEADING, 1, 5, 6; TRUSTS AND TRUSTEES, 1; PRINCIPAL AND AGENT, 1, 2; PROMISSORY NOTE, 3; RAILROADS, 1; REPLEVIN, 1, 3; TENANTS IN COMMON, 4; TITLE.

1. DEPOSITION: IMPEACHMENT OF WITNESS. Plaintiff took the deposition of a physician. At the trial defendant read the deposition. Plaintiff, with a view to contradicting it, introduced a conversation of the physician with another witness, to which the defendant objected on the ground that the plaintiff could not contradict his own witness. *Held*, without deciding the question, that the conversation corroborated the physician. Fairall v. City of Cameron, 1.

2. OPINION OF WITNESSES: SUGGESTION FOR ANOTHER TRIAL. It is suggested that at another trial the witnesses be kept within the rules announced in Eubanks v. Edina, 88 Mo. 650. Clark v. City of Brookfield, 16.

3. OBJECTION: ORDINANCES: PRACTICE. A general objection that certain ordinances were incompetent and irrelevant is of no avail if they are competent for any purpose. George v. Edelbrock, 56.

4. PERSONAL INJURY: PHYSICIANS: WRITTEN ORDER. Where the court appointed physicians to examine plaintiff's alleged injuries, while it may be proper to show that they made the examination under written order of court, yet the refusal to allow such proof is not reversible error. Ib.

5. CONTRADICTION OF PHYSICAL FACTS: IMPROBABLE ACTS. While the facts in evidence in this record are improbable, they are not a contradiction of physical facts and the doctrine of Hook v. Railway, 162 Mo. 569, does not apply. Berger v. C. & A. Ry. Co., 127.

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6. **Rebuttals: court's discretion.** Plaintiff's evidence tended to show that she was riding in the smoking car; defendant's, that she was in the chair car. In rebuttal the court permitted parties who were in the chair car to testify that they did not see plaintiff in that car. *Held,* not an improper exercise of the court's discretion. Ib.

7. **Unassailed general reputation: passenger conductor.** Evidence of the general reputation of parties to a forensic proceeding is not competent for the mere purpose of raising presumptions favorable to one party or disadvantageous to another; so where the allegation is that the conductor struck the passenger, evidence, of his general reputation, and his general conduct toward ladies especially, is not competent so long as such reputation is unassailed. Ib.

8. In the case at bar there is abundant evidence to support the verdict. Fullerton v. Carpenter, 197.

9. **Chattel mortgage: conversion.** Where the maker of a chattel mortgage was the tenant of defendant, who knew that he was carrying on his business under the name of Echo Publishing Company, and that under such name he had executed a chattel mortgage to secure a debt, the fact that he thereafter levied on the property covered, and sold it under execution, and purchased the same, made him a purchaser with full notice of the mortgage, and not an innocent purchaser, so that he bought subject to the mortgage, making his retention of the property a conversion, on account of which he was liable to the mortgagee for its value. Crawford v. Benoist, 219.

10. **Injunction: remedy at law: practice, trial: practice, apellate: bill of exceptions.** In the case at bar, the evidence preserved in the bill of exceptions fails to show that plaintiff did not have an adequate remedy at law. *Held,* injunction will not lie. Gildersleeve v. Overstolz, 303.

11. **Practice, appellate.** It is not the proper province of an appellate court, in reviewing the record in an ordinary action at law for the recovery of money, to pass upon the weight of evidence. Carr v. Ubsdell, 326.

12. **Construction of Iowa code.** In the case at bar, the evidence shows that the respondent was not engaged in the operation of a railway, but in the reconstruction of an old and theretofore abandoned railway track, preparatory to a resumption of its use as a railway, and the provisions of section 2071 of the Iowa Code do not apply to the case. Mitchell v. Wabash Ry. Co., 411.

13. **Street grading: photographs.** In an action to recover damages for changing the grade of a street photographs of the *locus in quo* after the completion of the injury, if proven to be true, are admissible in evidence. Robinson v. City of St. Joseph, 503.

14. **Practice: remark of court.** In an action to recover damages for changing the grade of a street, where the defendant was offering to prove the effect of a prior change of grade of a street on another side of the lots, the remark of the court: "The question is, what the lots were worth immediately before the grading was done and immediately after. Penn street is just the same as if a ravine was there," is held harmless error, if improper. Ib.

15. **Rejection of matter already in: harmless error.** The refusal on objection to admit certain evidence of a fact which is amply shown by other evidence unobjected to is harmless error. Ib.

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16. DECLARATION OF WIFE: CONTRADICTION OF WITNESS. In a fire case the plaintiff was asked if his wife had not said in the presence of himself and others that fire occurred in a certain manner. *Held*, the evidence was improper since a wife's declaration is incompetent against the husband, and could not be shown for the purpose of contradicting the witness. Hutchins v. Mo. Pac. Ry. Co., 548.

17. WRITTEN STATEMENT OF WITNESS: CONTRADICTION. The written statement of a witness as to the origin of a fire is incompetent except for the purpose of contradicting the witness. Ib.

18. Examining a witness on his written statement may be incompetent and is a matter within the discretion of the court since if the writing contradicts him, it will appear upon its reading, and especially in this case is such examination improper where the questions had been answered before. Ib.

19. REFUSAL OF, IMMATERIAL. Where the answer to a question can throw no light upon the issue on trial, it is properly refused. Ib.

20. EXPERT: LIGHTNING-KILLED CATTLE: HARMLESS ERROR. Knowledge and experience are the test in determining whether a witness is qualified as an expert, and where he has no knowledge or experience in such matters he may not testify as to whether certain cattle were killed by lightning or not; but, however, where the defendant subsequently introduces evidence to the same effect the error is harmless. White v. Farmers' Mutual Fire Ins. Co., 590.

21. OBJECTIONABLE QUESTION: NEGATIVE ANSWER: HARMLESS ERROR. Where objection to a question is sustained and the witness, however, answered, "I don't know about that," the error is harmless. Ib.

EXCEPTIONS. See AGENT, REFEREE, 1, 2.

EXCHANGE. See CONTRACT, 4.

EXCEPTION. See PRACTICE, APPELLATE, 8.

EXCLUSION. See TENANTS-IN-COMMON, 2.

EXPENSES. See SCHOOLS, 4.

EXPERT. See WITNESSES.

EXPERT TESTIMONY. See ATTORNEY AND CLIENT, 2; EVIDENCE, 20; PRACTICE, TRIAL, 11.

EXTRAORDINARY CARE. See ORDINANCES.

FACTS. See EVIDENCE, 5; NEGLIGENCE, 1.

FAILURE OF CONSIDERATION. See CORPORATIONS.

FALSE IMPRISONMENT.

1. INFORMATION OF INSANITY: EVIDENCE: THREATS. In an information filed in the probate court as to plaintiff's insanity, it was stated that he had threatened the life of the defendant. Subsequently plaintiff sued defendant for false imprisonment under a warrant issued on the information by the probate judge. *Held*, it was error on the trial not to permit the plaintiff in testifying in his own behalf to answer

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the question whether he had not threatened defendant's life two days before the filing of the information. Dougherty v. Snyder, 495.

2. INSANITY: PROBATE COURT: INFORMATION: JUDICIAL ACTION. Upon the filing of an information as to the mental unsoundness of a citizen of the county, the probate court has jurisdiction to inquire into the matter, and, if satisfied of the propriety thereof, to issue his warrant for the arrest and detention of such party; and in so doing the court acts judicially and a warrant so issued, though improvident and wrongful, protects the informant against an action for false imprisonment. Ib.

3. MALICIOUS PROSECUTION: REMEDY: COSTS. The remedy of one who is unjustly imprisoned is by recovery of costs which may be awarded him, or the redress afforded by some statute or by action for malicious prosecution. (Authorities cited and distinguished.) Ib.

4. ACTION. No action for false imprisonment lies against one who in good faith files his information with the probate judge touching the sanity of a citizen of the county. There must be *mala fides* or the proceedings must be a sham. Ib.

5. HUNG JURY: DISMISSAL. The fact that an informant, after the disagreement of a jury as to the sanity of the person informed against, requested a dismissal of the proceeding, is of little or no importance in the absence of other facts showing *mala fides*. Ib.

FATHER. See DIVORCE 1, 2, 3.

FEES.

1. CONTINGENT FEE: CONTRACT: WITNESS ASSIGNEE: CAUSE OF ACTION. The fact that an attorney's fee is contingent upon the successful termination of contemplated litigation does not disqualify him as a witness to prove that a contract was made by which the cause of action to be litigated was assigned to the plaintiff by another party, since deceased. Mott v. Bernard, 265.

2. JUDGMENT: INJUNCTION: PRACTICE, TRIAL. A judgment will not be enjoined for a flaw in procedure which produces no substantial injury to the party against whom the judgment went. Ib.

3. PLEADING AND PRACTICE: EQUITY: BILL IN EQUITY. In this case the plaintiffs seek to enjoin a judgment against them, recovered by defendant, on the ground that the cause of action had been assigned by the defendant before he sued on it; but the petition contains no allegations, nor is there any proof that the plaintiffs were prevented from interposing any defense they had to the other action by the fact that it was prosecuted in defendant's name; nor was it shown that any unjust or oppressive consequence resulted from its being prosecuted in defendant's name instead of in the name of the party to whom he had assigned it. *Held*, that there is no equity either in the petition or in the proof, and the bill was properly dismissed. Ib.

FELLOW-SERVANT. See MASTER AND SERVANT, 12.

FINDING. See PASSENGER CARRIERS, 4.

FORECLOSURE. See CHATTEL MORTGAGES, 1.

FOREIGN INSURANCE COMPANY. See INSURANCE, 13.

FORMER SUIT. See DIVORCE, 5.

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FRANCHISE. See MUNICIPAL CORPORATIONS, 8.

FRATERNAL-BENEFIT SOCIETIES. See INSURANCE, 13.

FRAUD. See BUILDING AND LOAN ASSOCIATIONS, 3, 4; EQUITY, 1; PROBATE COURT, SALES.

LAW: EQUITY: PRACTICE, TRIAL. Fraud is cognizable at law as well as in equity, and when a defendant without objection submits his case to a jury who tried it on the law side of the court, he can not be heard to complain that he tried it on a wrong theory. Jones v. Silver, 231.

FUND. See SCHOOLS.

GARNISHMENT. See BANKS AND BANKING, EQUITY, 2.

GENERAL DENIAL. See PLEADING.

GOODS. See PRINCIPAL AND AGENT, 1.

GRADING. See EVIDENCE, 13; MUNICIPAL CORPORATIONS, 10.

GRANTOR.

CONTRACTOR: AGREEMENT. The grantors and the contractor afterwards settled on an agreed sum which the contractor should pay them for the meeting of such bills. *Held*, that the grantors' recovery against the trustee was limited to such sum. Wallrath v. Bohnenkamp, 242.

GUARDIAN AND CURATOR.

1. CURATOR'S COMPENSATION. Where a curator is not required to give any considerable part of his time to the collection and preservation of his ward's estate, his allowance under the statute is five per cent upon the whole amount of money received. In re Steele's Estate, 9.

2. COMPENSATION: ATTORNEY'S FEE: COURT QUESTION. While a curator who is an attorney may employ the services of a lawyer, it is still a question for the court to determine the necessity of such services and their value. Ib.

3. ANNUAL SETTLEMENTS: JUDGMENTS: EVIDENCE. The annual settlements of a curator are judgments and constitute a prima facie case in his favor which may, as in this case, be overcome by other evidence. Ib.

4. COURT'S DUTY. The court should guard with great care the interest of minors and protect them against the cupidity of others. Ib.

HARMLESS ERROR. See ATTORNEY AND CLIENT, 2.

HOLDER. See BILLS AND NOTES, 3.

HUMANITARIAN DOCTRINE. See STREET RAILWAY, 2.

HUNG JURY. See FALSE IMPRISONMENT, 5.

IDENTITY. See ASSAULT, 1, 2, 3.

IMMORAL CONTRACT. See CONTRACT, 1, 2.

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IMPEACHMENT. See EVIDENCE, 1.

IMPROVEMENTS. See ASSESSMENTS, MUNICIPAL CORPORATIONS, 14.

INCIDENTAL FUND. See SCHOOLS, 1.

INDEMNITY. See INSURANCE, 12.

INDEPENDENT CONTRACTOR. See NEGLIGENCE, 10, 11, 12.

INDICTMENT. See ASSAULT, 4, 5, 6.

INDORSEMENT. See BILLS AND NOTES, 1, 2, 3.

INDORSEE. See BILLS AND NOTES, 3.

INDORSER. See PROMISSORY NOTE, 2.

INFERENCE. See NEGLIGENCE, 1.

INFORMATION. See FALSE IMPRISONMENT, 1, 2.

INSANITY. See FALSE IMPRISONMENT, 1, 2.

INJUNCTION. See EVIDENCE, 10; FEES, 2; MONOPOLIES, 2.

1. POSSESSION: TRESPASS TO REAL ESTATE. One out of possession can not maintain injunction for a trespass to real estate. Gildersleeve v. Overstolz, 303.

2. SALE UNDER DEED OF TRUST: PETITION. A petition alleging that plaintiff is the owner of certain real estate, that some years before a person named, conveyed said land in trust, that afterward defendant, trustee under such deed was advertising the land for sale in a certain newspaper in which such sales could be advertised under the law, states no cause of action for injunction to restrain such sale, it not appearing what was the character of the trust in the instrument, apparently unrecorded, or the nature of the advertisement or how such sale would effect plaintiff's title. Wilson v. Gray, 632.

INJURY. See NEGLIGENCE, 10, 11, 12.

INNOCENT HOLDER. See BILLS AND NOTES, 3.

INSTRUCTIONS. See ASSAULTS, 6; ATTORNEY AND CLIENT, 2; CERTIFICATE OF TITLE, CONTRACT, 3; CONVERSION, 1; DAMAGES, 12; ERROR, JURY, 2, 3; MASTER AND SERVANT, 11; MUNICIPAL CORPORATIONS, 2, 3, 4, 5, 13; NEGLIGENCE, 1, 7, 8, 16; PLEADING, 1, 5, 6, 7, 11; PRACTICE, TRIAL, 1, 4; TENANTS-IN-COMMON, 1, 2, 5; TRUSTS AND TRUSTEES, 1.

PRACTICE, TRIAL. Requested instructions are properly refused which are covered by instructions given. Koelling v. Gast Bank Note & Lith. Co., 664.

2. VERDICT: JURY: PRACTICE, TRIAL: DAMAGE. An instruction telling the jury if they found for the plaintiff on the second count of his petition their verdict should be in such sum as they found to be justly due him under the contract, was so modified by other instructions telling them how to estimate the damages to plaintiff, that the jury were not left to pass on the law of the matter, but were advised specifically as to what facts they must weigh in estimating the damages. Biest v. Versteeg Shoe Co., 137.

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3. Breach of contract. Instructions that if plaintiff gave some attention to his own affairs while in defendant's employ with defendant's consent, and that if he gave time to his own affairs but not so as to take up time which should have been devoted to defendant's business, such acts were not breaches of plaintiff's contract, *held*, proper, especially in view of the counterparts of said instructions given at defendant's request that if plaintiff neglected defendant's business to attend to his own, this was a breach of his contract. Ib.

4. Peremptory, when given: practice, trial. Where there is testimony tending to prove plaintiff's case, by direct proof or by reasonable inference, it is not proper to give a peremptory instruction or declaration of law to find for defendant. Carr v. Ubsdell, 326.

5. Evidence: error: practice, trial. An instruction is erroneous which is not based on evidence. Patee v. McCabe-Bierman Wagon Co., 356.

6. Abstraction: harmless error. Where an instruction enunciating a proper rule of law is preceded by an axiomatic abstraction, the matter is harmless, but the practice is rather to be condemned than commended. Robinson v. City of St. Joseph, 503.

7. Issues. Where an instruction embraces within its hypotheses the facts constitutive of plaintiff's case and within the issues, it is a proper expression of the law. Ib.

8. Embraced in others: refusal. Where an instruction contains a proposition fully and clearly enunciated in other instructions, there is no impropriety in refusing it. Ib.

INTEREST. See Accounting.

Contracts: construction: statute. The statute only allows interest on contracts and judgments, and where it was stipulated in an insurance policy that interest should not begin until sixty days after adjudication, meaning adjudication by the company which never in fact occurred, interest begins to run only from the date of the judgment. White v. Farmers' Mutual Fire Ins. Co., 590.

INSURANCE. See Arbitration and Award, 1.

1. Powers of soliciting agents: waiving contract. An insurance company like an individual may, by writing or parol, modify or enlarge the powers of its agent or by its conduct and course of business estop itself to deny the power of such agent to waive forfeitures, proofs and the like, notwithstanding limitations of power in his appointment. (Cases reviewed.) Ross-Langford v. Mercantile Town Mut. Ins. Co., 79.

2. Scienter: estoppel. A soliciting agent being informed that the insured building was a dwelling with one room used as a millinery store, described the building in the application as a dwelling and the company accepted the premium and issued the policy. *Held*, the act of the agent is the act of the company, and it is estopped to question the correctness of the description or to claim a forfeiture of the policy. Ib.

3. Town mutual: powers of agent: statutory construction. The statute providing that no officer, agent, etc., of a town mutual company shall have authority to waive conditions, etc., is made for the benefit of the company and may be waived by it, and while it may

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insist upon the limitations against the unauthorized acts of its agents, neglect to do so before the issuing of a policy and accepting the premium will prevent its doing so after a loss. Ib.

4. The statute is notice of the limitations on agents, but does not prevent the waiving of such limitations. Ib.

5. WAIVER. Mensing v. The American Insurance Company, 36 Mo. App. 602, is considered in connection with similar cases and shown to be overruled in effect in Springfield Laundry Co. v. Insurance Co., 151 Mo. 90, and in subsequent cases. Ib.

6. ASSESSMENT PLAN: NATURE OF POLICY: STATUTORY CONSTRUCTION. Under the provisions of section 7901, Revised Statutes 1899, every contract of life insurance, whereby the benefit secured is in any manner or degree dependent upon the collection of any assessment upon any person holding similar contracts, is a contract of insurance on the assessment plan. Williams v. St. Louis Life Ins. Co., 449.

7. In the case at bar, when the policy of insurance was issued, its payment on the death of the insured did "in some manner or degree" depend upon the collection of an assessment upon the persons holding similar contracts; *held*, that the contract of insurance is on the assessment plan. Ib.

8. MISREPRESENTATION: WARRANTY. Any misrepresentation made by the applicant, to procure a policy of insurance on the assessment plan, and which is warranted to be true and enters into the contract of insurance, voids the policy. Ib.

9. An insured who signed the application and submitted to the medical examiner, and knew that a policy had been issued, will be conclusively presumed to know, when applying for other insurance, that she had existing insurance. Ib.

10. AMENDMENT: STATUTORY CONSTRUCTION. The only amendment effected by the Act of 1897, being now, as amended, section 7910, Revised Statutes 1899, was to incorporate section 7896 (the suicide statute), 7890 (the misrepresentation statute) and 7891 (requiring a deposit of the premiums paid before a defense on the ground of misrepresentation can be made), of the general laws of the State into the section and to apply them to foreign insurance companies doing business in this State on the assessment plan. Ib.

11. ASSESSMENT PLAN: POLICY OF THE LEGISLATURE. And it was not the purpose of the Legislature to subject domestic companies, doing business on the assessment plan, to other general laws. Ib.

12. PARTNERSHIP: LIABILITY: INDIVIDUAL NEGLIGENCE. An insurer indemnifying a partnership against loss by accident to its employees from the negligence of the partnership, is only liable when the injury happens to the employee while engaged in the work of the partnership and by reason of the negligence of the partnership; and there is no liability for the individual negligence of a member of the partnership when not engaged in the partnership business. Kelley v. London Guar, & Accident Co., 623.

13. FRATERNAL BENEFIT SOCIETIES: STATUTORY CONSTRUCTION. A foreign fraternal beneficiary association, such as the Modern Woodmen of America, which has complied with the laws of Missouri relating to fraternal beneficiary associations, is subject to the burdens and entitled to the immunities pertaining to those societies in this State,

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their status and responsibilities being prescribed by a particular article of the statutes (article 2, chapter 12) and not by the general insurance statutes (section 1410, Revised Statutes 1899). McDermott v. Modern Woodmen, 636.

14. Under the provisions of sections 1419 and 1410, Revised Statutes 1899, it was intended not only to permit foreign associations to do business in this State if they comply with the statutes, but to do it on the same terms domestic corporations may. Ib.

15. Fraternal benefit societies: statutory construction. The proviso that no misrepresentation made in obtaining or securing a policy of insurance on the life of a citizen of this State shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to a loss on the policy (Revised Statutes 1899, section 7840), is not contained in the article on fraternal beneficial societies, but in the one on ordinary insurance and is not binding on fraternal societies. Ib.

16. And it is sufficient to avoid the policy or certificate counted on in the case at bar, that any false statement or representation, whether material to the risk or not, was made by the deceased to procure it, and inasmuch as all the answers to the questions propounded to him were agreed to be warranties, if any of them were false, the contract is annulled whether the false statement was fraudulently or innocently made. Ib.

17. Representations in application for insurance: warranties. The difference between the legal effect of a mere representation and a warranty is, that if the representation turns out to be substantially true as to facts material to the risk, the policy of insurance which it induced will be upheld, although the representation was false in unessential particulars; but a warranty must be strictly true, as it defines the limits of the obligations assumed by the insurer and if it is false in any part, whether that part effects the risk or not, there can be no recovery on the contract. Ib.

18. Certificate of insurance: application for insurance. In the case at bar, both the certificate sued on and M's application declared in strong and reiterated language that the answers in the application were warranted to be literally and exactly true and that their literal and exact truth was a condition precedent to any binding contract between M. and the company. *Held*, that the answers of the applicant were made warranties by the agreement of the parties without regard to their materiality, and the question for decision is was any of them shown to be false in such sense as to render the contract void. Ib.

19. In the case at bar, the applicant answered the interrogatory as to whether he was of sound mental and physical health and free from disease or injury at the date of the application for insurance, in the affirmative, and it is asserted by the defendant that this answer was false, and the trial court instructed the jury that the meaning of the inquiry was whether or not the applicant have any grave, important or serious disease, whether he had a state of health free from disease or ailment which affected his general healthfulness and the soundness of his system, and that the inquiry did not embrace a temporary ailment or indisposition having no tendency to undermine or weaken the constitution: *Held*, that although the applicant had some slight temporary ailment, he could not say with literal and exact truth that he was free from disease within the meaning of the interrogatories addressed to him. Ib.

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20. Where, as in the case at bar, it is conceded that the applicant for insurance, in a fraternal beneficiary society, stated that he had not been visited by a doctor and had not been treated for an ailment for seven years, when in truth and in fact he had been visited and treated by a physician within a month before making application for insurance, and that said applicant misstates the fact, and that the answer was a warranty, this will defeat an action by the beneficiary for insurance on the policy. Ib.

INSURER. See MASTER AND SERVANT, 4.

INTENTION. See POOLS AND TRUSTS, 2.

IOWA CODE. See EVIDENCE, 12.

ISSUE. See INSTRUCTIONS, 7; MASTER AND SERVANT, 11.

JUDICIAL NOTICE. See APPELLATE COURTS.

COURTS OF APPEALS: PRACTICE, APPELLATE. The Court of Appeals takes judicial notice of all of its records and proceedings. Gildersleeve v. Overstolz, 303.

JUDGE. See CHANGE OF VENUE, 1; CRIMINAL LAW, 1, 2.

1. SPECIAL, HOW SELECTED: CRIMINAL PRACTICE. Under section 2597, Revised Statutes 1899, providing that if in any case the judge shall be incompetent to sit, and no person to try the cause will serve when elected as special judge, the judge of said court shall in either case set the cause down for trial, and request the judge of some other circuit to try the cause. State v. Gilham, 296.

2. A special judge, called to try a criminal case by the regular judge of the circuit thereof who was disqualified, has the same powers as a regular judge, under sections 2595 and 2597, Revised Statutes 1899, which empower a regular judge of the circuit court to pass upon an application for a change of venue, and to request another judge to serve if the application is granted. Ib.

JUDGMENTS. See ACTION, 5; APPEAL BOND; CHANGE OF VENUE, 2; EQUITY, 1; FEES, 2; GUARDIAN AND CURATOR, 3; PRACTICE, TRIAL, 1, 3; SCHOOLS, 3; SURETY.

NOMINAL DAMAGES. A judgment for twice the value of the monthly rents and profits of the premises is rightly given in an unlawful detainer case, for the wrongful detention of the premises after notice to vacate, and the stipulation made by the parties in the case at bar did not confine the damages for detention to a nominal sum. Hadley v. Bernero, 314.

JUDICIAL ACTION. See FALSE IMPRISONMENT, 2.

JUDICIAL NOTICE. See MASTER AND SERVANT, 13.

JURISDICTION. See ARBITRATION AND AWARD, 1; DRAMSHOP LICENSE, 3; JUSTICES' COURTS, 2, 3; PRACTICE, APPELLATE, 4; PRACTICE, TRIAL, 5.

OF COURTS OF APPEAL: PRACTICE, TRIAL: PRACTICE, APPELLATE. In order to oust the Courts of Appeals of Missouri of jurisdiction on a constitutional question, the question must be in the trial court and the benefit of some constitutional provision denied to the party who claims it. Kreyling v. O'Reilly, 384.

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JURY. See BILLS AND NOTES, 3; INSTRUCTIONS, 2; MASTER AND SERVANT, 8; NEGLIGENCE, 9; PRACTICE, TRIAL, 11; PROOF.

1. COURT: EVIDENCE: PRACTICE, TRIAL: PRACTICE, APPELLATE. The jury, or the court sitting as a jury, is the sole judge of the weight of the evidence, and their findings will not be reviewed on appeal, unless there is no substantial evidence to support the verdict or it is obvious that the verdict is the result of passion, prejudice or corruption. Fullerton v. Carpenter, 197.

2. INSTRUCTION: MEASURE OF DAMAGES. After a jury had been fully instructed as to the basis of recovery and measure of damages, if any, and had retired, they asked for further instructions as to what items of damages were claimed by plaintiff, whereupon the court gave them an itemized statement of plaintiffs' claims. *Held*, that such action did not vary the previous instructions, and was proper as a mere recapitulation of the plaintiffs' testimony as to the damages. Wallrath v. Bohnenkamp, 242.

3. INSTRUCTION: CONTRACT: EVIDENCE: PRACTICE, TRIAL. In the case at bar, it should have been referred to the jury to say on the entire evidence whether there was an actual agreement or meeting of the minds of the parties in respect to where the goods were to be stored, or a misunderstanding between them as to that matter. Kennedy v. Portman and Woempner, 253.

JUSTICES' COURT. See PRACTICE, TRIAL, 5; RES ADJUDICATA, 2.

1. UNLAWFUL ENTRY AND DETAINER: APPEAL TO CIRCUIT COURT. An appeal from the judgment of a justice in an unlawful entry and detainer action is returnable to the circuit court within six days after the rendition of the judgment, if the judgment is rendered during a term of the circuit court to which the appeal is taken. Hadley v. Bernero, 314.

2. CHANGE OF VENUE: JURISDICTION: STATUTORY CONSTRUCTION. Under section 3973, Revised Statutes 1899, a justice of the peace has no further jurisdiction of a cause on the filing of a proper application for a change of venue, except to grant such change. O'Reilly v. Henson & Allen, 491.

3. WAIVER. After the filing of an application for a change of venue and its refusal, the defendant may abandon the cause or he may continue to take part in the trial and defend himself, and such conduct will not waive his objection to the jurisdiction as long as the application is not withdrawn. Ib.

4. STATEMENT, SUFFICIENCY OF. A statement before a justice of the peace, sufficiently specific to inform the opposite party of the foundation and character of the demurrer arrested, is a full and sufficient compliance with the statutory provision. Johnson v. Kahn, 628.

5. The following statement filed before a justice of the peace meets the requirements of the statutes: "Mexico, Mo., Sept. 17, 1901. E. Kahn, Dr. to Willis Johnson: Making sale of saloon stock, $92.50." Ib.

KILLING STOCK. See RAILROADS, 1.

LAND. See CONTRACT, 4.

LANDLORD AND TENANT. See MUNICIPAL CORPORATIONS, 10.

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LATENT DEFECTS. See MASTER AND SERVANT, 5, 6, 7, 8.

LAW. See EVIDENCE, 10; FRAUD; INSURANCE, 10; MORTGAGE AND DEED OF TRUST, 1, 2; PRACTICE, TRIAL, 5.

LEASE.

STIPULATION TO DELIVER PREMISES: COVENANT: RIGHTS OF REVERSIONER. A stipulation in a lease that, if a sale of the property shall be made during the continuance of the lease, the lessees will vacate and deliver up possession on thirty days' notice in writing, is a covenant which runs with the reversion, and enures to the benefit of the grantee of the fee. Hadley v. Bernero, 314.

LEGISLATURE. See INSURANCE, 11.

LIABILITY. See APPEAL BOND; ARBITRATION AND AWARD, 2; BAILMENT; CERTIFICATE OF TITLE; DAMAGES, 9; DIVORCE, 1, 2, 3; INSURANCE, 12; PARENT AND CHILD; PROMISSORY NOTE, 1.

LIGHTNING FRANCHISE. See MUNICIPAL CORPORATIONS, 8.

LIFE INSURANCE. See INSURANCE, 6, 7, 8.

LIGHTNING. See EVIDENCE, 20.

LIEN. See MECHANIC'S LIEN.

LIMIT. See ASSESSMENTS.

LIMITATIONS. See ACCOUNT; CHANGE OF VENUE, 2.

The limitation of the time within which a suit may be brought for failure of a corporation to report to the Secretary of State is fixed at six months from the first day of September of the year in which the report is due, and the right of action accrues on that day. State ex rel. v. Missouri Exposition & Land Co., 226.

LIS PENDENS. See CERTIFICATE OF TITLE.

MAINTENANCE. See DIVORCE, 1, 2, 3.

MAKER. See PROMISSORY NOTE, 2.

MALICIOUS PROSECUTION. See FALSE IMPRISONMENT, 3.

MASTER AND SERVANT. See AGENT; NEGLIGENCE, 13.

1. SAFE APPLIANCES. It is the duty of the master to furnish the servant reasonably safe appliances and tools with which to work. Mitchell v. Wabash Ry. Co., 411.

2. SAFE APPLIANCES: NEGLIGENCE: EVIDENCE. In an action for negligence, evidence of other independent and disconnected acts of negligence is not adimssible, nor of a negligent act which could not contribute to the injury complained of. Franklin v. M., K. & T. Ry. Co., 473.

3. NOTICE. Though a negligent act is in a sense collateral to the act complained of, yet if an inference may be drawn bearing upon the alleged negligence, evidence thereof is admissible; and so where the master furnished a lot of mauls from which the servant selected one, by reason of a defect in which he was hurt, he may in an action to

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recover damages for his injury show that the whole lot were "chipped, nicked, slivered and scaled," as from such fact the inference is deducible that the maul in question was defective and that the defendant had notice thereof. Ib.

4. INSURER. The master must use reasonable and ordinary care in procuring appliances and in keeping them in repair. He is not required to furnish absolutely safe tools; and reasonable and ordinary care depends upon the nature of the appliance and the dangers to be encountered. Ib.

5. PRESUMPTION: LATENT DEFECTS. The servant may presume that the appliances are reasonably safe and he does not have to search for latent defects, but uses tools with known defects at his own risk; he, however, is required to exercise care incident to the situation in which he is placed; and whether he does so is a question for the jury. Ib.

6. It is presumed that the appliance furnished is safe, and if injury results it is presumed the master had no notice of the defect and was not negligent; but in this case the defect in the mauls was known to the master and they were furnished to the servants with such knowledge. Ib.

7. Though the servant know of the defect in the maul he may recover for the injury resulting from the defect if he reasonably supposed he could use it with safety, and the fact that two kinds of mauls were furnished for the same work, one chipped and the other not, affords a basis for the inference that the chipped lot were defective. Ib.

8. EVIDENCE: JURY QUESTION. A verdict founded upon inferences having no just basis in the facts, should not be permitted to stand, but on the evidence in this record the case was properly sent to the jury. Ib.

9. ORDER OF MASTER. Where the master instructs the servant to use his maul in a certain way, the servant had a right to rely on his master's knowledge and judgment as to the strength of the maul and its adaptability to the use he was directed to put it, and the servant can not be said, as a matter of law, to be guilty of contributory negligence in so using it. Ib.

10. PROXIMATE CAUSE: JURY QUESTION. The question whether plaintiff's injuries were occasioned by striking a spike with his maul or by striking it against another maul being a controverted issue of fact, was for the jury. Ib.

11. INSTRUCTION: WIDENING ISSUES. An instruction set out in the opinion, which after being modified was given by the court, is held not to have widened issues tendered by the pleadings, but if so it was properly given since no objection was made to the admission of the evidence on which it was based. Ib.

12. FELLOW-SERVANT: ALTER EGO. Where the superintendent of the master is present directing the movements which result in the injury of an employee, there can arise no question of fellow-servant. Borden v. The Falk Co., 566.

13. JUDICIAL NOTICE: DOMESTIC ANIMALS: NATURE OF MULES. The mule is a domestic animal whose treacherous and vicious nature is so generally known that even courts may take notice thereof. Borden v. The Falk Co., 566.

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14. NEGLIGENCE: JURY QUESTION. The failure of the master to take firm hold of a team of mules attached to a wagon, under which his servants were at work, is held gross negligence, and on a review of the evidence the case was properly sent to the jury. Ib.

15. CONTRIBUTORY NEGLIGENCE: ASSUMPTION OF RISK. On a review of the record no evidence of contributory negligence is found; nor does the question of the assumption of risk arise. Ib.

MATERIALMEN. See MECHANICS' LIEN.

MEASURE OF DAMAGES. See DAMAGES, 18; JURY 2, 3; PASSENGER CARRIERS, 2.

MECHANIC'S LIEN.

CONTRACTOR. A subcontractor was informed several months before by the contractor that they (the contractors) had had trouble with the architect, and the subcontractor knew that the work on a house had been abandoned; this was sufficient to put him upon his inquiry as to whether or not the contract with the owner had been abandoned, and the work done thereafter by the subcontractor could not be considered done under his contract with the contractors, for the purpose of determining the time of filing the lien. Naughton & Dolan Slate Co. v. Nicholson, 332.

MEMORANDUM. See AGREEMENT, 4.

MINING STATUTE. See TENANTS-IN-COMMON, 3.

MISJOINDER. See PETITION, 2.

MISREPRESENTATIONS. See EQUITY, 1; INSURANCE, 8.

MISTAKE. See ACTION, 5.

OF CLERK IN FILLING BLANKS IN WRIT OF SUMMONS: PRACTICE, TRIAL: APPEARANCE BY ATTORNEYS. Where several defendants appeared at the April term of the circuit court, by attorney, and answered the petition, the fact that the clerk by mistake made the copies of summons served on them returnable at the December term following was immaterial. Patterson v. Yancey, 681.

MONEY. See MORTGAGE AND DEED OF TRUST, 1.

MONOPOLIES. See POOLS AND TRUSTS.

1. REGULATION OF PRICES: STATUTORY CONSTRUCTION: BOYCOTT. Under the direct provisions of Revised Statutes 1899, chapter 143, article 2, section 8978, an agreement between a plumbers' association and dealers and manufacturers, whereby the latter agree not to sell supplies to others than members of the association, and the former to boycott any dealer found selling to a non-member, entered into for the purpose of fixing prices and limiting to production of such articles, was unlawful. Walsh v. Ass'n of Master Plumbers, 280.

2. PLEADING AND PRACTICE: REMEDY: STATUTORY CONSTRUCTION. Section 8978, Revised Statutes 1899, declares agreements to regulate prices or to control or limit trade, illegal, and section 8982, Revised Statutes 1899, to furnish an additional remedy for the control and restraint of pools, trusts and conspiracies in restraint of trade: *Held*, that any remedy existing before the enactment of the above was not

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taken away, nor abridged by section 879, Revised Statutes 1899, which makes it the duty of the Attorney-General and the prosecuting attorneys under his direction, to institute proceedings to restrain such illegal agreements. Ib.

3. INJUNCTION, WHEN IT WILL LIE: PRACTICE, TRIAL. Injunction will lie to dissolve an illegal agreement between a plumbers' association and dealers and manufacturers, whereby the latter agree not to sell to others than members of the association, and the former to boycott any dealer found selling to a non-member, and to restrain the enforcement of such agreement against a plumber who, by reason thereof, has been unable to purchase supplies with which to do his work. Ib.

MORTGAGEE. See CHATTEL MORTGAGES, 1.

MORTGAGE AND DEED OF TRUST.

1. SURPLUS MONEY ARISING FROM SALE, DISPOSITION OF: RULES OF LAW. Surplus money realized by the sale of land under a mortgage or deed of trust is treated as realty and not as personalty, in respect to the rules of law governing its disposition. It remains real estate in the hands of the mortgagee or trustee to be disposed of according to the laws of real property. Kreyling v. O'Reilly, 384.

2. Where a person dies seized of real estate incumbered by mortgage, and the mortgage is thereafter foreclosed, the surplus is regarded as realty and goes to the heirs of the decedent instead of his personal representatives. Ib.

3. STATUTE OF LIMITATIONS: STATUTORY CONSTRUCTION. The construction of section 4277, Revised Statutes 1899, is that the limitation therein contained applies as well to suits to enforce a mortgage or deed of trust by proceeding against the proceeds of the mortgaged land, as to those which proceed against the land itself. Ib.

4. CONSTRUCTION OF CONSTITUTION. Section 4277, Revised Statutes 1899, is constitutional and does not impair the obligation of contracts. Ib.

5. RETROSPECTIVE ACT: RIGHT: REMEDY. And section 4277, Revised Statutes 1899, is not retrospective; it was designed to affect securities given before it was adopted but it only affects the remedy and not the right. Ib.

6. CONSTRUCTION OF CONSTITUTION. Section 15, article 2, Constitution of Missouri, does not mean that no statute relating to past transactions can not be passed, but merely that none can be passed which tells on such transactions to the substantial prejudice of the parties interested. Ib.

MOTION. See BILLS AND NOTES, 6; PRACTICE, APPELLATE, 5, 7, 8; PRACTICE, TRIAL, 4.

MOTORMAN. See NEGLIGENCE, 2; STREET RAILWAY, 2, 3.

MUNICIPAL CORPORATIONS.

1. NEGLIGENCE: PLEADING: PETITION: WAIVER. A petition summarized in the opinion and inartificially drawn, defectively states a good cause of action for negligence of the defendant city in failing to keep its sidewalks in a reasonably safe condition for travel; and the defects were waived by failing to call them to the court's attention before trial. Fairall v. City of Cameron, 1.

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2. DEFECTIVE SIDEWALK: NOTICE: INSTRUCTION. An instruction relating to the notice of the defective condition of the sidewalk is held not to conflict with other instructions, but to be incomplete, and a harmless error, when taken in connection with other instructions. Ib.

3. NEGLIGENCE: DEFECTIVE SIDEWALK: INSTRUCTION. An instruction telling the jury if the sidewalk was "in an unsafe condition for persons passing over," etc., "then they should find," etc., is held to be harmless error since taken with the other instructions and accompanying verbiage the jury must understand that "unsafe condition" as used, meant not reasonably safe. Ib.

4. DEFECTIVE SIDEWALK: NOTICE: EVIDENCE: INSTRUCTION. Direct evidence is not the only way whereby knowledge of a defect in a sidewalk may be shown, but notice thereof may be shown by reasonable inference from other facts; and an instruction telling the jury there was no evidence of actual notice to the authorities of the city is condemned on the testimony in this case, and the more so since the instruction, when taken with others, tended to confuse the jury on an important issue. Clark v. City of Brookfield, 16.

5. RECOVERY: INSTRUCTION. An instruction relating to the elements constituting a city's liability for injuries arising from a defective sidewalk, which permitted the verdict for the defendant if the jury believed the city authorities did not know of the defect but might have known thereof if they had been diligent, is condemned especially when taken in connection with other instructions. Ib.

6. CONSTRUCTION: CARTHAGE SPECIAL CHARTER: ELECTRIC LIGHTS. Legislative grants to municipalities are construed strictly, and in case of reasonable doubt the power is held not granted; so the city of Carthage, under its special charter of 1875, had no power to light its streets by electricity nor to grant a franchise for that purpose. City of Carthage v. Carthage Light Co., 20.

7. VOTE. The city of Carthage, under its special charter of 1875, had no power to grant the franchise of lighting the city without a majority vote of the people; and poles and wires erected in the street under such grant constitute a nuisance. Ib.

8. THIRD-CLASS CITY: LIGHTING FRANCHISE: VOTE. Cities of the third class, under the Act of 1893 may grant the franchise of lighting the city by electricity provided the consent of the majority of the qualified voters is obtained thereto, and without such consent an attempted grant is nugatory and the grantee takes nothing that he can transfer. (Waterworks v. Webb City, 78 Mo. App. 422, distinguished.) Ib.

9. ACQUIESCENCE: ESTOPPEL: PLEADING. The long asquiescence of a municipality to the exercise of a franchise can not be considered as an estoppel unless it is pleaded and relied on at the trial. Ib.

10. CHANGING GRADE: OBSTRUCTING SIDEWALK: LANDLORD AND TENANT: PARTIES. A landlord had a water pipe laid into his house with a water plug in the sidewalk; thereafter the city changed the grade of the sidewalk, and exposed the plug and plaintiff tripped thereon and was injured. She made the city, the landlord and the waterworks company defendants. The evidence showed the city, only, liable. *Held*, while the tenant in possession was a proper party yet since the city, only, was liable on the verdict, the failure to make him a party would not reverse the judgment. George v. Edelbrock, 56.

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11. PROPERTY-OWNER: PRACTICE. In a trial against a city and a property-owner for an injury resulting from alleged negligence in front of the property when the city is shown to be liable, the judgment against it should not be affected by errors made in favor of the property-owner; but a city may make a point against the property-owner on such error on appeal if properly raised at the trial, and an instruction complained of is held proper. Ib.

12. PERSONAL INJURY: NOTICE: STATUTORY CONSTRUCTION. The object of the statute providing for written notice where a party has been injured on the streets, is to require notice of the time and place of the accident and its general nature and the attending circumstances in a general way so that opportunity would be afforded for examination and thereby prevent false or exaggerated claims; and where a party gave two notices, the latter referring to the same injuries as the first, and enumerating others, she will not be confined to the first in proving her injuries. Ib.

13. CHANGING GRADE: OBSTRUCTING SIDEWALK: PROPERTY-OWNER: INSTRUCTION. An instruction broadly stating that no verdict could be rendered against the municipality unless one was rendered against the property-owner, is held properly refused. Ib.

14. PUBLIC IMPROVEMENTS: SPECIAL TAXES: SPECIAL TAX BILL: ACTION. Under the charter of the city of St. Louis, article 6, section 25, declaring that the certificate to a tax bill shall be prima facie evidence that the work and material charged in the bill have been furnished and that the work has been executed, and of the correctness of the prices, and of the liability of the persons therein named as the owners of the land charged with such bill to pay the same, the admission of a special tax-bill in an action thereon establishes a prima facie case in favor of plaintiff. Heman v. Farrish, 393.

15. CONSTRUCTION OF CHARTER OF ST. LOUIS. Under the charter of St. Louis, article 6, section 22, requiring the cost of sewers to be assessed on the property of the district, no recovery on a special tax-bill for such an improvement can be had without such an assessment. Ib.

16. The St. Louis charter, article 6, section 22, provides that as soon as a district sewer, etc., is fully completed, the board of public improvements shall assess the costs as a special tax against all lots in the district, etc., pro rata, and that the board shall cause to be made out a certified bill of such assessment against each lot in the district, *held*, that where the board, after receiving the sewer commissioner's report, showing the aggregate cost of the construction of a sewer, approved the report, and, having before it a computation of the whole area of the sewer district, referred the matter to the president of the board to make out the special tax-bills, which he presented to the board without their being dated or signed, when they were approved by the board, and dated and signed by the president, the approval of the bills constituted an assessment, within the meaning of section 22, article 6 of the charter of the city of St. Louis. Ib.

NEGOTIABLE NOTE. See BILLS AND NOTES, 3.

NEGLIGENCE. See DAMAGES, 4, 5, 6, 7, 8, 9, 10, 11; INSURANCE, 12, 14, 15; MASTER AND SERVANT, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15; MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 12; PETITION, 2; STREET RAILWAYS, 1, 2, 3.

1. INFERENCE FROM FACTS. In the case at bar, negligence is not to be inferred from the mere happening of the injury. Hornstein v. United Railway Co., 271.

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2. MOTORMAN, DUTY OF. It is the duty of a motorman in charge of a street car to sound his gong on approaching a crossing, and the omission to do this is negligence. Ib.

3. WITNESS: EVIDENCE: NEGATIVE EVIDENCE. In the case at bar defendant failed to produce the motorman as a witness, and the negative evidence of the failure of defendants to prove affirmatively that the gong was sounded at the railway crossing, if such was the fact, was sufficient proof of the allegation of negligence to send that issue to the jury. Ib.

4. DUTY OF PLAINTIFF. In the case at bar, it was plaintiff's duty to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track. Ib.

5. CONTRIBUTORY NEGLIGENCE: PROXIMATE CAUSE. Where the negligence of plaintiff contributed to and was the proximate cause of his injury, no recovery can be had by him. Ib.

6. INSTRUCTION: ERROR. In the case at bar, it was error for the trial court to refuse to give the following instruction to the jury. "If you believe from the evidence that the injury to the plaintiff was caused by the joint, mutual and concurring negligence of plaintiff and defendant's agents in charge of the car, and that the negligence of neither without the concurrence of the negligence of the other, would have caused said injury, then the plaintiff is not entitled to recover and your verdict must be for defendants." Ib.

7. CONTRIBUTORY NEGLIGENCE: PLEADING: INSTRUCTION. Though contributory negligence be defectively pleaded, yet if no objection is raised before the trial, evidence of such negligence is admissible and an instruction may be based thereon. Borden v. The Falk Co., 566.

8. INSTRUCTION: WHOLE CASE. An instruction covering the whole case should be so framed as not to exclude from the jury's consideration any point raised by the defense. Ib.

9. EVIDENCE: JURY. The province of a jury is not invaded when on a failure of evidence the court so declares, and an instruction is approved which ignores the defense of contributory negligence, assumption of risk, and fellow-servant, since there was no evidence to support such defenses. Ib.

10. INJURY TO EMPLOYEE: INDEPENDENT CONTRACTOR: LIABILITY OF OWNER OF BUILDING: ACT OF BYSTANDER: TORT: CARE. Plaintiff's husband was killed by being knocked off of a temporary scaffold by a moving elevator in a shaft where he was doing carpenter work upon a building. He was in the employ of an independent contractor, but the agent for the owner of the building, for whose use the work was done, had directed the manner and mode in which the particular work should be performed. *Held*, that the owner of the building (in the circumstances stated in the opinion) was bound to exercise reasonable care to prevent such a movement of the elevator under his control as caused the death of plaintiff's husband. Appel v. Eaton & Prince Company, 428.

11. The employee of an independent contractor for the installment of an elevator, in the elevator shaft mentioned in the foregoing headnote, was working at the bottom of the shaft. He requested a bystander to run the elevator out of his way, which he did, stopping the elevator at the third floor above, afterwards the bystander was induced to run the elevator higher, by a stranger who appeared on the third floor.

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In consequence the elevator ran into a scaffold on which the plaintiff's husband was working. *Held*, that the contractor for the installment of the elevator was not liable for the act of the volunteer bystander in making the last upward movement of the elevator, in the circumstances described in the opinion. Ib.

12. Where an employee is present, so as to be able to direct in his work the action of a volunteer assistant, an inference is permissible that the former participates in the work of the assistant in the prosecution of the work in certain circumstances described. Ib.

13. MASTER: SERVANT: AGENCY. The liability of an employer for negligence of his servant toward a third person depends on the principles of agency, and does not extend beyond the scope of his employment. It does not exist where the negligence is that of a substitute engaged by a servant without any authority to delegate his master's power in respect of the particular work in charge of the servant. Ib.

14. The measure of care required of any person is marked by the circumstances of each case. It is such care as the person should have exercised in the emergency, in the opinion of the final judge of the event; and, if there is room for reasonable difference of opinion, then the criterion is the judgment of a jury determining the case, which the rules of law require of that person. Ib.

15. DEFECTIVE SIDEWALK: NOTICE: CONTRIBUTORY NEGLIGENCE. On the evidence in this cause plaintiff made a prima facie case by showing the defective condition of the sidewalk for such length of time that notice thereof could be inferred by the jury, and the defect was not so glaring that a prudent person would not have undertaken to use the walk. Huff v. City of Marshall, 542.

16. INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. Instructions submitting the questions of negligence and contributory negligence are reviewed and *held*, when taken together, to have sufficiently presented the issues to the jury. Ib.

17. Instructions covering points covered by other instructions need not be given though in themselves proper enough. Ib.

18. SCOPE OF EVIDENCE. In showing the condition of a sidewalk, in order to bring notice to the municipality, the evidence need not be confined to the immediate place of the accident, but may properly take in the condition of the walk along the premises in front of which the injury occurred. Ib.

NEW TRIAL. See BILLS AND NOTES, 6; DAMAGES; PRACTICE, APPELLATE, 5, 7, 8.

NOMINAL DAMAGES. See JUDGMENTS.

NOTICE. See APPELLATE COURTS; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS, 2, 4; NEGLIGENCE, 15.

OBJECTION. See EVIDENCE, 3.

TO ADMISSION OF EVIDENCE: PRACTICE, APPELLATE. Unless the ground of an objection to the admission of evidence is specified when it is made, the objection will not be considered on appeal. Fullerton v. Carpenter, 197.

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OBSTRUCTION. See MUNICIPAL CORPORATIONS, 10.

OFFICES AND OFFICERS.

CITY ENGINEER: DE FACTO. Though a city engineer be informally inducted into office, yet if he is recognized as such and discharges the duties of the office, he becomes a *de facto* officer and his acts are valid so far as they concern the public and the rights of third persons who have an interest in the things done. Akers v. Kolkmeyer, 520.

OPINION. See EVIDENCE, 2, 5.

ORDER. See EVIDENCE, 4; MASTER AND SERVANT, 9.

ORDINANCES. See CITIES, TOWNS AND VILLAGES, 1, 2, 3; EVIDENCE, 3; STREET RAILWAYS, 1, 2.

OF THE CITY OF ST. LOUIS: DUTY: EXTRAORDINARY CARE. In the case at bar, the ordinance of the city of St. Louis (McQuillin's Ann. Mun. Code, section 1760), does not create a new duty, nor require the exercise of extraordinary care by the motorman of a street car. Gebhart v. St. Louis Transit Co., 373.

OWNER. See SALES.

PARENT AND CHILD.

LIABILITY OF PARENTS: RIGHTS OF CHILDREN. Children are not parties to the quarrels of their parents, and they lose no rights thereby. Shannon v. Shannon, 119.

PAROL EVIDENCE. See ACTION, 4.

STATUTORY CONSTRUCTION. A promissory note may not be contradicted by oral evidence of a contemporary agreement that it is not to be paid according to its terms, but this rule does not forbid proof of want or failure of consideration. (Revised Statutes 1899, section 645). Holmes v. Farris, 305.

PARTIES. See ADMINISTRATOR, 1; CHANGE OF VENUE, 3; MUNICIPAL CORPORATIONS, 10; PRACTICE, TRIAL, 7; RES ADJUDICATA, 1.

1. DEFECT OF: PRACTICE, TRIAL: PLEADINGS: WAIVER. Defect of parties is waived by not objecting to said defect either by demurrer or answer. State ex rel. v. Exploration and land Co., 226.

2. PRACTICE, APPELLATE. Where no question of a defect of parties is raised in the circuit court, the question can not be raised on appeal. Tapana v. Shaffray, 337.

PARTICIPATION. See BUILDING AND LOAN ASSOCIATIONS, 2.

PARTNERSHIP. See INSURANCE, 12.

PASSENGER CARRIERS.

1. DAMAGES: PUNITIVE. Under the evidence in this cause the question of punitive damages was properly submitted to the jury. Berger v. C. & A. Ry. Co., 127.

2. MEASURE OF: SHAME: EVIDENCE. Specific proof of mental anguish and humiliation is not necessary as they may be inferred sufficiently

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from the evidence which discloses the nature, character and extent of the injuries. Ib.

3. DAMAGES: PHYSICAL AND MENTAL SUFFERING. Pain of mind must be connected with bodily injury to be the subject of damages, unless the injury is accompanied by circumstances of malice, insult or inhumanity. Rawlings v. Wabash Ry. Co., 511.

4. CARRYING BEYOND DESTINATION: CONFLICTING EVIDENCE: EXCESSIVE FINDING. Where the evidence is conflicting as to an injury received by a person carried beyond his station and also in regard to the proximate cause of such injury, the verdict of the jury is conclusive, and in this case an assessment of one hundred and twenty-five dollars is not excessive. Ib.

5. WHO IS PASSENGER: FARE: LIABILITY. Taking a place in the carrier's conveyance with the intention of being carried, creates an implied agreement to pay fare, and at once there springs up the reciprocal duty and responsibility of carrier and passenger. Rawlings v. Wabash Ry. Co., 515.

6. CARRYING BY STATION: DAMAGES: SICKNESS. A person carried by his station may recover for inconvenience, loss of time and labor, and necessary expense, but not for anxiety of mind nor effect upon health, such as sickness. Ib.

7. ALIGHTING PASSENGER: STARTING CAR: ACT OF STRANGER: ACTION. A passenger carrier is not liable for injuries caused solely by the acts of passengers not holding to it any relation of agency; so, where a car stopped and while plaintiff was alighting a stranger to the company pulled the bell cord, causing the motorman to start the car, whereby the passenger was injured, the carrier is not liable. Krone v. Southwest Mo. El. Ry. Co., 609.

PASSENGER CONDUCTOR. See EVIDENCE, 7.

PERFORMANCE. See CONTRACT, 18, 19.

PERSONAL INJURIES. See EVIDENCE, 4; MUNICIPAL CORPORATIONS, 12; STREET RAILWAY, 1, 2.

PETITION. See ATTORNEY AND CLIENT, 1, 2; DAMAGES, 3; DRAMSHOP LICENSE, 1, 2, 3; INJUNCTION, 2; MUNICIPAL CORPORATIONS, 1; PLEADING, 2, 8, 9, 10; PRACTICE, TRIAL, 9; STREET RAILWAY, 1.

1. COUNT: PLEADING: VARIANCE. The second count of the petition *held* to sufficiently charge that defendant agreed to pay plaintiff the amount of his necessary traveling expenses, not to exceed a certain sum, instead of charging that he was to be paid said sum absolutely; and, *held*, further, that there was no variance between the contract pleaded and the one proven in this regard. Biest v. Versteeg Shoe Co., 137.

2. COMMON LAW: PLEADING AND NEGLIGENCE: MISJOINDER OF CAUSES OF ACTION. A petition in an action for personal injuries which joined in the same count a cause of action for common-law negligence and one for negligence under the provisions of a city ordinance, such as in the case at bar, is not objectionable for misjoinder of causes of action. Gebhart v. St. Louis Transit Co., 373.

PLEADING. See ACTION, 3; ATTORNEY AND CLIENT; CHANGE OF VENUE, 2; CONTRACT, 1, 2, 8, 12, 13; DAMAGES, 3; MUNICIPAL CORPORATIONS, 1, 9; NEGLIGENCE, 7; PARTIES, 1, 2; PETITION, 1; PRINCIPAL AND AGENT, 1.

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1. General denial: evidence: instruction. Under a general denial, the defendant may prove any fact which goes to show that the plaintiff never had any cause of action, and if inadmissible evidence is admitted without objection, the plaintiff can not object to instructions submitting issues so raised. Gibson & Bro. v. Jenkins, 27.

2. Contract: breach: petition. A petition set out in the opinion is held as pleading a breach of an unpleaded contract and, therefore, not to justify the introduction of any evidence, since a contract must be pleaded *in haec verba* or according to its legal effect with a proper assignment of the breaches relied on. Currell v. H. & St. J. Ry. Co., 93.

3. Aider by answer: action. The defective allegations of a petition may be supplied by those of the answer so that when read together a cause of action is stated. Ib.

4. Reply: issue. A petition pleaded the failure to furnish cars to ship cattle at one o'clock in the morning. The answer set up a contract to ship plaintiff's cattle that day and to deliver them in Chicago on the next day, and averred plaintiff's refusal to ship. The reply admitted the contract as set out in the answer. *Held*, if the answer supplied the defects of the petition as to the provisions of the contract, then the issue was on the contract in the answer and not on the alleged breach of another and different contract referred to in the petition, and plaintiff could not recover for the breach alleged in his petition. Ib.

5. Evidence: instructions. On an examination of the evidence, *held*, there was no proper evidence sustaining a breach of the contract averred in the petition, and instructions authorizing a recovery were improper and could not be referred to the contract set up in the answer, since on that contract it was immaterial when the cattle should be shipped, the material part being their delivery in Chicago at the agreed time. Ib.

6. On the evidence it is *held* that defendant sustained the averment in its answer that it was ready and willing to ship plaintiff's cattle on the day mentioned and that issue was submitted to the jury by one of defendant's instructions showing that the case was not tried on the theory of the answer aiding the petition. Ib.

7. Trial practice: pleading: defendant's instruction: estoppel. The fact that a defendant may submit and ask instructions on the theory on which the court tries the case will not estop him from insisting that the case was tried on a false theory where on the very threshold of the trial he denies plaintiff's right of recovery, since the defendant can not abandon his case because the ruling of the court is against him, but is forced to fight the battle on the ground selected by the court and his adversary. Ib.

8. Aider by answer: petition (Per Smith, P. J., dissenting). The allegations of the answer aided the defective petition and accomplished all that could have been done by an amended petition, and defendant's answer admitted the existence of the contract and set forth its provisions, and thereby supplied the omissions of the petition. Ib.

9. Petition, sufficiency of. Under Revised Statutes 1899, section 1015, providing that no corporation required by statute to furnish reports to the Secretary of State shall be excused by reason of its failure to receive blanks required to be supplied by the Secretary of

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State, a petition in an action to recover the penalty provided by section 1017, Revised Statutes 1899, for failure to make such report, need not allege that blanks had been mailed to the corporation therefor. State ex rel. v. Missouri Exploration & Land Co., 226.

10. DEFECTIVE PETITION: PRACTICE, TRIAL: STATUTORY CONSTRUCTION. Where three petitions are adjudged insufficient, it is proper for the court to enter final judgment, under section 623, Revised Statutes 1899. Tapana v. Shaffray, 337.

11. VARIANCE: INSTRUCTION: AFFIDAVIT. A petition alleged the killing of five head of two-year-olds and two head of yearlings. The evidence showed five milch cows and three yearlings. The instruction declared if the jury believed that said cattle or any part of them were so killed, then they should find the value of such cattle. The variance between the petition and the proofs is held harmless and does not affect the instruction since there was no affidavit showing in what respect the defendant had been misled. White v. Farmers' Mutual Fire Ins. Co., 590.

PLEADING AND PRACTICE. See BILLS AND NOTES, 1, 2, 4, 5, 6; CONTRACT, 8, 11; DAMAGES, 3; FEES, 2; MONOPOLIES, 2.

PHOTOGRAPH. See ASSAULT, 3; EVIDENCE, 13.

PHYSICAL FACTS. See EVIDENCE, 5.

PHYSICIAN. See EVIDENCE, 4.

POLICY. See INSURANCE. 11.

POOLS AND TRUSTS.

1. MONOPOLY: CONTRACTS: COMPETITION: DEFENSE. Certain breweries had an agreement that they would not sell to any one indebted to either of the others for beer until he paid that debt. *Held*, the agreement tended to establish a monopoly, deprived the debtor of the benefit of competition and served to impose a penalty upon his condition, and was in conflict with the Missouri statute relating to pools and trusts, and constituted a bar to an action on an account owed to a member of the combination. Heim Brewing Co. v. Belinder, 64.

2. INTENTION. The intention of the parties to a contract will not avail when its effect is within the statute. Ib.

3. RIGHT TO SELL. One may exercise his choice as to whom he will sell, but he can not enter into a contract whereby he binds himself not to sell, for he thereby barters away his right of choice and destroys the very right he claims the privilege of exercising. (Cases considered.) Ib.

4. ACT OF COMBINATION. Whether an act is harmful and unlawful is not determined by the fact that the same character of act could be committed harmlessly by one, since the doing of the act by a number may give it an impulse not only oppressive to individuals but mischievous to the public at large and thus give criminality to an act that would be perfectly innocent in a legal view when done by an individual. (Cases considered.) Ib.

5. PUBLIC: PRIVATE RIGHTS. Whether a combination is lawful or unlawful, is ascertained by its character and purpose as it affects the

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rights of the public to unrestrained trade or as it affects the private rights of individuals, and an agreement not to sell to one in debt is an invasion of his rights since he has a right to buy which equals the right to another not to sell, and the latter's right can not be stretched to interfere with the former's right to buy of others. Ib.

6. COMMON LAW STATUTE. A debtor to fix a statutory penalty of disability to collect a debt by reason of an unlawful combination must show not merely a combination unlawful at common law, but likewise unlawful under the statute. Ib.

POSSESSION. See INJUNCTION, 1; TENANTS IN COMMON, 3.

POWER. See INSURANCE, 1; REFEREE, 2.

PRACTICE, APPELLATE. See APPELLATE COURTS; ATTORNEY AND CLIENT, 2; BILLS AND NOTES, 5, 6; CONTRACT, 14; DAMAGES, 14; EVIDENCE, 10, 11; JUDICIAL NOTICE; JURISDICTION; OBJECTIONS; PRACTICE, TRIAL, 4, 6, 8; PROOF; RAILROADS, 2; REFEREE, 2; TESTIMONY; TRUST AND TRUSTEES, 3.

1. REVIEW OF ACTION OF TRIAL COURT: ERROR: PRESUMPTION. In cases where the appellate court has authority to review the facts, it may discard incompetent evidence without reversing the judgment on that account; but in an action at law, upon trial by the court, the admission of incompetent evidence is reversible error unless the appellate court is convinced that no prejudice resulted therefrom to the party appealing. Holmes v. Farris, 305.

2. Error is presumed to be prejudicial until it is clearly shown to be harmless. Ib.

3. AMENDMENT OF ABSTRACT OF RECORD. An abstract of the record filed in the Court of Appeals may be amended on the authority of the Supreme Court in Lane v. Railway, 132 Mo. 4. Ib.

4. RESTITUTION: JURISDICTION. An appellate tribunal, invested with authority to reverse, annul or revise judgments, has authority to restore parties to the *status quo* before the judgment, and on application should do so; and the fact that the courts below and the appellate court may have had no jurisdiction of the matter involved can not defeat the power to order restitution. O'Reilly v. Henson & Allen, 491.

5. ABSTRACT: FILING MOTION FOR NEW TRIAL. That a motion for new trial was filed must be shown by the abstract of the record proper, and a mere recitation of its filing in the bill of exceptions is insufficient. Kirk v. Kane, 556.

6. ABSTRACT: SUPPLEMENT. A supplemental abstract supplying the defects of the original one may be filed any time before the cause is submitted. Turney v. Ewins, 620.

7. MOTION FOR NEW TRIAL: RECORD. A supplemental abstract should be such, that taken with the original the record will be abstracted as contemplated by the statute and rules of court, and where the two taken together fail to show by a record entry the filing of a motion for new trial, they are insufficient. Ib.

8. MOTION FOR NEW TRIAL: RECORD ENTRY: EXCEPTIONS. The recitation in the bill of exceptions that a motion for new trial was filed can not be noticed, nor can exceptions recited in the record proper. Ib.

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PRACTICE, TRIAL. See ACTION, 3; APPELLATE COURTS; BILLS AND NOTES, 3, 4; CERTIFICATE OF TITLE; CONTRACT, 12, 13, 17; DAMAGES, 12; ERROR; EVIDENCE, 3, 10, 14; FEES, 2; FRAUD; INSTRUCTION, 1, 4, 5; JURISDICTION; JURY, 1; MISTAKE; PLEADING, 7, 10; PROOF; REPLEVIN, 1; RES ADJUDICATA, 2; STREET RAILWAY, 1; SURETY; TESTIMONY.

1. DIFFERENT COUNTS: ONE JUDGMENT. A petition for an accounting contained two counts. The court made a separate finding on each count and then entered one general judgment. *Held*, harmless in this cause, however hurtful it may be in other cases. Gibson & Bro. v. Jenkins, 27.

2. INSTRUCTIONS: MODIFICATION OF: INVITED ERROR. Where the court modifies an instruction to harmonize with the theory of other instructions asked by the same party, such party invites the error and can not complain. Gregg v. Land & Mining Co., 44.

3. ABANDONED COUNT: JUDGMENT: COSTS. Where there are several counts in a petition and by subsequent pleadings some are abandoned and on the trial others are dismissed, the defendant is entitled to judgment on such counts and the plaintiff should be taxed with the costs incident to such counts and preparation for trial thereon. Edwards v. M., K & T. Ry., 103.

4. INSTRUCTION: MOTION FOR NEW TRIAL: ERROR: ASSIGNMENT OF ERROR: PRACTICE, APPELLATE. Where the attention of the trial court is not called to an instruction given by the court, in the motion for a new trial, plaintiff must be deemed to have waived his objection to it, and this assignment of error can not be considered by the appellate court. Fullerton v. Carpenter, 197.

5. LAW: EQUITY: JUSTICES' COURTS: JURISDICTION. And it is not competent by a mere motion before a justice of the peace to change the nature of an action from a legal to an equitable one so as to oust the jurisdiction of the justice. Jones v. Silver, 231.

6. PRACTICE, APPELLATE. Where a case is tried on the theory that appellant was liable if it furnished respondent with a defective car, the appellant will not be permitted on appeal to insist the respondent should have been held to strict proof of the allegation in the petition that appellant built the defective car at its own shops. Mitchell v. Wabash Ry. Co., 411.

7. PARTIES ARE BOUND BY ACTION IN TRIAL COURT. Where the instructions for respondent told the jury in effect that if a car was made of brash and brittle wood and was not reasonably safe for the purpose for which it was being used when loaded with an ordinary load, and for this cause broke down and injured the employee of the appellant, then the fact that it was overloaded did not absolve appellant from liability, and counter to this the jury were instructed for appellant, that if the car was reasonably safe when not overloaded, but was overloaded and broke down from this cause, that respondent could not recover. *Held*, that appellant adopted respondent's theory of the law by its counter instruction and can not be heard in an appellate court to complain of the error, if it be error, which it adopted and acted upon at the trial. Ib.

8. PRACTICE, APPELLATE: VERDICT: APPELLATE COURT. Where the verdict is for the plaintiff the evidence should be viewed by the appellate court in its most favorable aspect in support of the verdict. Cunliff v. Hausman, 467.

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9. TWO COUNTS IN PETITION: FINDING ON ONE. Where there are two counts in the petition and the verdict is for the plaintiff on one count, silence as to the other count is in effect a finding for the defendant. Dougherty v. Snyder, 495.

10. TRIAL COURT: PROCEDURE: TRIAL. The provision of a trial court in a case before a jury is not to determine when proof has been made sufficient for a verdict, but is confined to instructing when testimony introduced tends to establish a fact in issue. Johnson v. Kahn, 628.

11. EXPERT TESTIMONY: JURY: COURT. The testimony of experts is admitted as a matter of necessity to be received and considered with great caution. The competency of such witnesses to testify is a legal question for the court to decide, but the weight to be given to expert testimony is to be determined by the jury. Ib.

PREJUDICE. See DAMAGES, 14.

PRESUMPTION. See BILLS AND NOTES, 5; MASTER AND SERVANT, 5; PRACTICE, APPELLATE, 1; PROMISSORY NOTE, 3.

PRICES. See MONOPOLIES, 1, 2, 3.

PRIMA FACIE CASE. See PROMISSORY NOTE, 4.

PRINCIPAL AND AGENT. See SALES; TITLE.

1. DEALING WITH GOODS: ESTOPPEL: PLEADING: EVIDENCE. To estop a principal from claiming title against the vendee of his agent on the ground that he was permitting the agent to treat the property as his own, it is necessary that the facts be pleaded and proved. Western Realty Co. v. Musser, 114.

2. COMMISSION: SECURING A TENANT: EVIDENCE. Defendant agreed to pay plaintiff a certain commission if she obtained a tenant for a building which defendant was erecting. She showed the plans to one who wished to rent, and twice visited the building with him, but he refused to rent at the terms offered. After a portion of the building had been rented to other tenants, another real estate agent influenced the one who plaintiff had solicited to rent the remainder of the building, and on different terms from those offered through plaintiff; plaintiff took no part in the contract finally made. *Held*, that plaintiff was not entitled to a commission. Henkle v. Dunn, 671.

PRIVATE RIGHTS. See POOLS AND TRUSTS, 5.

PROBATE COURT. See FALSE IMPRISONMENT, 2.

ALLOWANCES: SET ASIDE FOR FRAUD. D. died leaving a widow and several children, and about three hundred acres of land. After his death C. sued one of the sons for breach of promise of marriage and recovered judgment for $3,000. After this suit was brought and a short time before the judgment was rendered the widow took out letters of administration and waived her dower right. Whereupon the children each presented to the probate court a claim against the estate for labor for the father, aggregating more than its value. The same attorney who defended the breach of promise suit acted for each of the claimants. The claims were allowed, each claimant testifying for the other. C. then instituted an action in equity to set aside the allowances as procured by fraud and collusion with the purpose of preventing her from realizing on her judgment, and the trial court entered a decree as prayed for. *Held*, that the evidence justified the court in so doing and the decree was affirmed. Crawford v. Dixon, 558.

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PROCEEDING. See DIVORCE, 3.

PROCEDURE. See ACTION, 3; PRACTICE, TRIAL, 10.

PROOF. See BILLS AND NOTES, 2; DAMAGES, 3; PROMISSORY NOTE, 4; STREET RAILWAY, 1.

JURY: PRACTICE, TRIAL: PRACTICE, APPELLATE. There was sufficient proof to go to the jury as to what plaintiff's necessary traveling expenses actually were. Biest v. Versteeg Shoe Co., 137.

PROXIMATE CAUSE. See MASTER AND SERVANT, 10; NEGLIGENCE, 5.

PUBLIC SEWER. See CITIES, TOWNS AND VILLAGES.

PROPERTY OWNER. See MUNICIPAL CORPORATIONS, 11.

PROMISSORY NOTE. See ACTION, 1.

1. CONSIDERATION: LIABILITY OF PARTIES. The surrender of a note is a good consideration for the making of another. Siemans v. Halske Electric Co. v. Ten Broek, 173.

2. INDORSER: MAKER OF NOTE. When a note is surrendered and a new one given, the new note is a new contract and not a continuation of the old one; and the question of the liability of a party thereto as maker or indorser must be ascertained from the position his name occupies on the new note, without regard to the nature of his liability on the old one. Ib.

3. EVIDENCE: PRESUMPTION. Where there is no evidence that it was understood when a party signed a note that he signed it as an indorser, or that he should be treated as an indorser, the presumption of law is that he signed it as a maker. Ib.

4. ACTION ON NOTE: EVIDENCE: PROOF: PRIMA FACIE CASE. In a suit upon a note whose execution is admitted, the payee makes out a prima facie case by the production of the note. Holmes v. Farris, 305.

PROPERTY. See ASSESSMENT.

PUBLIC IMPROVEMENTS. See ASSESSMENT; POOLS AND TRUSTS, 5.

QUALIFICATION. See WITNESSES.

QUESTION. See EVIDENCE, 21; MASTER AND SERVANT, 8.

RAILROADS.

1. KILLING STOCK: STOPPING TRAIN: EVIDENCE. In an action to recover damages for killing stock at a public crossing, if it is shown that the train could be easily stopped without endangering it after the engineer saw the cattle on or near the crossing, the plaintiff makes his case. Beall v. C. & A. Ry. Co., 111.

2. CONTRIBUTORY NEGLIGENCE: VERDICT: APPELLATE PRACTICE. Where the question of plaintiff's contributory negligence is fairly submitted to the jury, the appellate court accepts the verdict as found. Ib.

RATES. See COMMON CARRIER.

RATIFICATION. See CITIES, TOWNS AND VILLAGES, 3; CONTRACT, 18, 19.

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REAL ESTATE. See INJUNCTION, 1.

REBUTTAL. See EVIDENCE, 6.

RECORD. See PRACTICE, APPELLATE, 3, 8.

RECOVERY. See MUNICIPAL CORPORATIONS, 5.

REFEREE.

1. FILING EXCEPTIONS TO REPORT: TIME OF. Exceptions to the report of a referee are required by the statute to be filed within four days after the filing of the report, and this means four term days. So where the referee's report was filed on the last day of the term, the parties would have until the fourth day of the next term to file exceptions. Gibson Bros. v. Jenkins, 27.

2. REPORT OF: EXCEPTIONS: POWERS OF COURT: APPELLATE PRACTICE. Where a case is one for compulsory reference, the court can reject the report of the referee and make its own findings, and the exceptions in the appellate court must be to the action of the court and not to the report. Ib.

REFINEMENT. See DAMAGES, 18.

REFUSAL. See INSTRUCTIONS 8.

REGULATION. See MONOPOLIES, 1, 2, 3.

REMARK. See EVIDENCE, 14.

REMEDY. See EVIDENCE, 10; FALSE IMPRISONMENT, 3; MONOPOLIES, 2.

REMITTITUR. See DAMAGES, 1.

REPLEVIN.

1. CHATTEL MORTGAGE: EVIDENCE: ERROR: PRACTICE, TRIAL. In replevin, where defendant claimed title by foreclosure of a chattel mortgage given by one whose title plaintiff denied, it was not error to admit evidence tending to establish the indebtedness of the mortgagor to the defendant. Koelling v. Gast Bank Note & Lith. Co., 664.

2. AGENT. In replevin, where both parties deny that a purchaser of the property at a chattel mortgage foreclosure was acting as the agent of its grantor, instructions ignoring such controlling issue were properly refused. Ib.

3. EVIDENCE. In replevin, evidence examined, and *held* sufficient to support a finding that the purchaser of the property at a certain chattel mortgage sale acted as the agent of defendant's grantor, rather than of plaintiff's. Ib.

REPORTS. See CORPORATIONS; REFEREE, 1, 2.

REPRESENTATIONS. See INSURANCE, 17, 18, 19, 20.

REPUTATION. See EVIDENCE, 7.

RES ADJUDICATA.

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1. PARTIES. What is meant by identity of parties to the former suit to be effective as a bar in a later suit, is not that all of the plaintiffs or all of the defendants to the former suit must be parties plaintiff or defendant in the latter suit, but that some or all of the identical parties plaintiff and some or all of the identical parties defendant are made parties plaintiff and defendant in the latter suit. Jones v. Silver, 231.

2. JUSTICE'S COURT: CIRCUIT COURT: PRACTICE, TRIAL. Where the same questions were directly involved in a suit before a justice of the peace (and no appeal was taken from the judgment of the justice of the peace) and a suit in the circuit court, defendant is precluded from proving the defense he sets up in the answer in the circuit court, by the judgment of the justice. Ib.

RESTITUTION. See PRACTICE, APPELLATE, 4.

RETURN. See ACTION, 4.

REVIEW. See PRACTICE, TRIAL, 1.

RIGHTS. See CHATTEL MORTGAGES, 1; POOLS AND TRUSTS, 3.

RISK. See MASTER AND SERVANT, 15.

RULES. See MORTGAGES AND DEEDS OF TRUST, 1, 2.

SAFE APPLIANCES. See MASTER AND SERVANT, 1, 2.

SALES. See ADMINISTRATOR, 1; INJUNCTION, 2; MORTGAGES AND DEEDS OF TRUST, 1; POOLS AND TRUSTS, 3.

PRINCIPAL AND AGENT: OWNER: SECURITY: BILL OF LADING: ATTACHMENT: FRAUD. The interpleader bank allowed the defendant to buy hogs and draw his checks on it with the understanding that the bank should have two dollars per car for the use of the money. The defendant shipped the stock and delivered the unindorsed bill of lading with a draft to the bank. *Held*: (1) Defendant and not the bank was the owner of the hogs and there was no relation of agency between them. (2) That the bank was defendant's creditor and the unindorsed bill of lading with the accompanying draft operated as security to the bank for its debt, and was superior to the claim of an attaching creditor. (3) Whether the arrangement between the defendant and bank was affected with fraud was a question for the jury under all the facts. Clary v. Tyson, 586.

SCIENTER. See INSURANCE, 1.

SCHOOLS.

1. DEFINITIONS: INCIDENTAL: CONTINGENT: SCHOOL FUNDS. In the school law the terms "incidental fund" and "contingent fund" are used interchangeably, and the term "school fund" is generic, embracing the three distinct funds provided by the statute. State ex rel. v. District School Board, 613.

2. CLAIMS AGAINST DISTRICT: SPECIFIC FUND: BREACH OF CONTRACT. No claim arises against a school district except under contract, and the averment that it arises from a breach of contract is insufficient to indicate out of what fund it should be paid. Ib.

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3. JUDGMENT. The fact that a claim may be reduced to a judgment does not make it payable out of the incidental fund. It should be shown that the contract on which the judgment was based related to matters payable out of such fund. Ib.

4. OTHER EXPENSES. It may be shown that a judgment is payable out of the incidental fund by showing that it was not for teacher's wages or for building, as the words "all other expenses" comprehend any claim not payable out of the other funds. Ib.

SECURITY. See SALES.

SERVANT. See MASTER AND SERVANT.

SERVICE. See ACTION, 4.

SERVICES. See ATTORNEY AND CLIENT, 2.

SETTLEMENT. See BUILDING AND LOAN ASSOCIATIONS, 2, 3, 4; GUARDIAN AND CURATOR, 3.

SEWER. See CITIES, TOWNS AND VILLAGES, 1, 4, 5, 6; CONTRACT, 18, 19.

SHAME. See PASSENGER CARRIERS, 2.

SHERIFF. See ACTION, 4.

SICKNESS. See PASSENGER CARRIERS, 6.

SIGNATURE. See BUILDING AND LOAN ASSOCIATIONS, 4.

SPECIAL ASSESSMENT. See ASSESSMENT.

SPECIFIC FUND. See SCHOOLS, 2.

STATEMENT. See EVIDENCE, 17, 18, 19; JUSTICES' COURTS, 4, 5.

STATUTE. See INTEREST; POOLS AND TRUSTS, 6.

STATUTE OF FRAUDS. See AGREEMENT, 1, 2, 3, 4; CONTRACT, 4, 5, 6, 7, 12.

STATUTE OF LIMITATIONS. See CHANGE OF VENUE, 2; MORTGAGES AND DEEDS OF TRUST, 2.

STATUTORY CONSTRUCTION. See ASSESSMENTS; CHANGE OF VENUE, 3; CRIMINAL LAW, 1; DENIAL; DRAMSHOP LICENSE, 3; INSURANCE, 3, 4, 5, 6, 7, 10, 13, 15, 16; JUSTICES' COURTS, 2, 3, 4, 5; MONOPOLIES, 1, 2; MORTGAGES AND DEEDS OF TRUST 3, 4, 5, 6; PAROL EVIDENCE; PLEADING, 10; TERM OF COURT.

STOPPING TRAIN. See RAILROADS, 1.

STRANGER. See PASSENGER CARRIERS, 7.

SUIT. See DIVORCE, 5.

STREET CAR. See STREET RAILWAY, 2, 3.

STREET GRADING. See EVIDENCE, 13.

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1. DAMAGES: FORMER AND LATER CHANGE OF GRADE. In an action by a lotowner to recover damages for a change of grade in the street along the side of his lot, it is no defense that he had not used the money recovered in an action for changing the grade of a street in front of his lot some years before to reduce the grade of his lot so that the latter change of grade would have been no injury to his lot. Robinson v. City of St. Joseph, 503.

2. VALUE OF PROPERTY. The measure of damages for changing the grade of a street is the difference between the market value of the lot immediately before the injury and immediately after the completion of the injury. Ib.

STREET RAILWAY.

1. ORDINANCE OF THE CITY OF ST. LOUIS: NEGLIGENCE: ACTION: PERSONAL INJURY: ALLEGATION: PROOF: PETITION: PRACTICE, TRIAL. McQuillin's Ann. Mun. Code of the city of St. Louis, page 797, section 1760, providing that the person in charge of a street car shall keep a vigilant watch for all vehicles and persons on foot, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible, is a police regulation conferring a right of action on a party injured in consequence of a violation of it, without any allegation or proof that the ordinance has been accepted by the street car company. Gebhart v. St. Louis Transit Co., 373.

2. DUTY OF MOTORMAN ON STREET CAR: CITY ORDINANCE, MEANING OF: HUMANITARIAN DOCTRINE, WHAT IT IS. In the case at bar, the ordinance of the city of St. Louis (McQuillin's Ann. Mun. Code, section 1760) is simply declaratory of the municipality's approval of what is commonly called "the humanitarian, or last-chance doctrine," to-wit: that it is the duty of the motorman in charge of a running street car to keep a vigilant watch ahead and when he sees, or by the exercise of due diligence could have seen, the peril of the plaintiff in time to have avoided injuring him, and fails to do so, the company will be liable. Ib.

3. DUTY OF CONDUCTOR OF STREET CAR. The conductor of a street car is not required to keep a lookout to avoid accidents at street crossings. Ib.

SUFFERING. See PASSENGER CARRIERS, 3.

SUGGESTION. See EVIDENCE, 2.

SUMMARY JUDGMENT. See APPEAL BOND.

SUPPLEMENT. See PRACTICE, APPELLATE, 6.

SUPREME COURT. See CONSTITUTION.

SURETY. See APPEAL BOND; BONDS, 1, 2.

SURETY OF SHERIFF'S BOND: JUDGMENT: VACATING JUDGMENT: PRACTICE, TRIAL. Where the sureties on a sheriff's bond were jointly and severally liable, the fact that a default judgment rendered against one of such sureties was erroneous for want of proper service did not require a vacation of the judgment as to the other sureties. Patterson v. Yancey, 681.

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TAX-BILLS. See CITIES, TOWNS AND VILLAGES, 6; MUNICIPAL CORPORATIONS, 14.

TENANTS IN COMMON.

1. ACCOUNTING: CONTRACT: INSTRUCTION. Where a tenant in common sues his co-tenant for an accounting for rents and profits received, matters of contract between the parties are immaterial, and an instruction referring to a contract and its breach is properly refused. Gregg v. Land and Mining Co., 44.

2. EXCLUSION: INSTRUCTION. A tenant who has been excluded by his co-tenant can recover his proper share of the rental value of the property as well as for waste, but in an action for accounting for rents and profits received, such matters can not be injected by instruction. Ib.

3. POSSESSION: MINING STATUTE. A tenant in common in possession by consent without limit of time is a tenant at will or from year to year, and the mining statute does not determine his relation. Ib.

4. ACCOUNTING: ACCORD AND SATISFACTION: INSTRUCTION. Where, in an action for an accounting by a co-tenant there is no answer of accord and satisfaction, it is improper to instruct on such theory. Ib.

5. CONTRACT: INSTRUCTION: EVIDENCE. An instruction should keep within the limits of the issues presented by the pleadings and also the evidence. Ib.

TENDER. See CONTRACT, 16.

TERM OF COURT.

DEFINITION OF: VACATION: DEFINITION OF: STATUTORY CONSTRUCTION. The word "term," in the statute on the subject, signifies the entire period from the first day of the term, as fixed by law, to its close; and the word "vacation" signifies the period between the final adjournment of one term and the beginning of another. Hadley v. Bernero, 314.

TESTIMONY. See ATTORNEY AND CLIENT, 2; CONTRIBUTORY NEGLIGENCE; DAMAGES, 13; PRACTICE, TRIAL, 11.

COMMON CARRIER: PRACTICE, TRIAL: PRACTICE, APPELLATE. Under the meager testimony in this case bearing on the question, we are not prepared to say the trial court erred in holding that the defendant was not a common carrier and entitled to a lien on goods hauled by it as such; especially as no declarations of law defining a common carrier were requested. Defendant's business was the storage of personal property and moving household effects from one part of the city of St. Louis to another. Thompson v. New York Storage Co., 135.

THREATS. See FALSE IMPRISONMENT, 1.

TIME. See BILLS AND NOTES, 4; CONTRACT, 18, 19; REFEREE, 1, 2.

TITLE.

PRINCIPAL AND AGENT: EVIDENCE. S. purchased a newspaper through her agent, who subsequently leased it and made a chattel mortgage to and rented a room of defendant's intestate. The evidence attending these transactions is reviewed, and it is *held* that the agent acquired no

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title which was solely in S. and that the defendant's intestate by his acts and correspondence recognized S.'s title. Western Realty Co. v. Musser, 114.

TORTS.

TRANSFER. See BILLS AND NOTES, 1.

TREATMENT. See DIVORCE, 4.

TRESPASS. See DIVORCE, 6; INJUNCTION, 1.

TRIAL. See EVIDENCE, 2; PRACTICE, TRIAL, 10.

TRIAL COURT. See PRACTICE, TRIAL, 10.

TRUSTS AND TRUSTEES.

1. VIOLATIONS OF INSTRUCTIONS: DAMAGES. A petition set forth a contract between plaintiffs, as makers of a deed of trust, and defendant, as trustee, whereby defendant agreed to see that the money secured by the deed was applied to the payment of bills for labor and material and to the contracts for certain buildings on the land covered by the deed, in such a manner as to protect plaintiff's rights udner their contract with the contractor; and that by reason of the failure of defendant to exercise "the care and diligence which he had promised," and by reason of his "negligence and carelessness" in paying the money to the contractor while material and labor liens which the contractor was bound to meet were unsatisfied, plaintiffs sustained damages, etc. *Held*, that the petition counted on the contract, and not on the negligence of defendant as separate from his contract obligation. Wallrath v. Bohnenkamp, 242.

2. EVIDENCE: CONTRACT. Evidence in an action between the maker of a deed of trust and the trustee examined, and *held* sufficient to support a finding of a contract between them, whereby the trustee was to hold the money obtained under the deed, and expend it so as to protect the grantor's rights under a contract, which he had with the contractor who was building houses on the land covered by the deed. Ib.

3. DEED OF TRUST: CONTRACT: VERDICT: PRACTICE, APPELLATE. Where in an action between the maker of a deed of trust and the trustee, who retained the money, the evidence (all verbal) is sufficient to justify an inference that the money has not all been applied as called for by the contract between the parties, the court of appeals will not disturb a verdict necessarily so finding. Ib.

4. A trustee in a trust deed agreed with the maker that he would hold the money, and pay it out for labor and material for certain houses being built on the property covered by the deed, and not pay the contractor for the houses while there were any outstanding bills for labor and material. The trustee did pay the contractor while there were such outstanding bills, and the contractor, an insolvent, failed to apply the money to the payment of the bills. *Held*, that the grantors in the deed could recover against the trustee for any such bills they were compelled to pay by reason of such failure of the contractor to pay them out of the sum advanced to him by the trustee. Ib.

5. The trustee also agreed not to pay the contractor until the work was completed, but did so. *Held*, that the grantors could also recover against the trustee for any money they were obliged to expend in the completion of the houses, so far as such expenditures were occasioned

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by the misappropriation by the contractor of the payment to him by the trustee. Ib.

USER. See Cities, Towns and Villages, 1, 2.

USURY. See Building and Loan Associations, 2.

Where, at the time of a loan of money, the borrower offered to give his note for $300 on condition that the lender would turn over to him a note of a third party for $50 and interest, and pay him $235, it shows no usury on the part of the lender, though the maker of such note was insolvent. Crawford v. Benoist, 219.

VARIANCE. See Petition, 1; Pleading, 11.

VACATION. See Term of Court.

VALUE. See Street Grading, 2.

VERDICT. See Damages, 1, 14, 16, 17; Instructions, 2; Practice, Trial, 8; Railroads, 2; Trusts and Trustees, 3.

VOTE. See Municipal Corporations, 7, 8.

WAIVER. See Bills and Notes, 2; Insurance, 1, 5; Justices' Courts, 3; Municipal Corporations, 1; Parties, 1.

WAREHOUSEMAN.

Contract. In the case at bar, if the contract was to store the goods in one locality, and without the consent of plaintiff they were stored elsewhere and damaged or destroyed as a result of the failure of the defendants to perform their contract of bailment as it was made, a case for damages arose. Kennedy v. Portman and Woempner, 253.

WARRANTY. See Insurance, 8, 9, 17, 18, 19, 20.

WATERS AND WATER COURSES.

1. Surface water: overflowing stream: action. Waters overflowing the banks of a stream are surface water, but one obstructing the natural flow of water in a stream and thereby occasioning overflow is liable for the resulting damages. Edwards v. M., K & T. Ry. Co., 103.

2. Evidence in the record is reviewed and found sufficient to send to the jury the question as to whether the defendant railroad had obstructed a stream passing under its tracks by a piling bridge so as to cause an overflow. Ib.

WIFE. See Evidence, 16.

WITNESSES. See Evidence, 1, 2, 3, 16, 17, 18; Fees, 1; Negligence, 8.

Expert: qualification: value. Witnesses, residents of a city and acquainted with the lots in question, are qualified to give their opinions as to the difference in the value of the lots before and after a change of grade in the street, and they need not be engaged in the real estate business. Robinson v. City of St. Louis, 503.

WRIT OF ERROR. See Change of Venue, 2.

WRITTEN ORDER. See Evidence, 4.

WRITTEN STATEMENT. See Evidence, 17, 18.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

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RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any

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abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

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KANSAS CITY COURT OF APPEALS.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before mak- the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

RULE 25.—WHEN APPEAL IS RETURNABLE—CERTIFICATE OF JUDGMENT—TRANSCRIPT. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCoy, Clerk.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the*

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regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reason-

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ableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk."

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court,

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and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Every motion for rehearing should be founded on suggestions of some party to the case, or of counsel, pointing out distinctly such grounds of error as are claimed to exist in the judgment of this court or in the opinion delivered. Such motion must be filed within ten days after delivery of the opinion of the court, and a copy of the motion, with any brief to be submitted in support thereof, shall be served upon the opposite party within the same period.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the

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commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the Circuit Court or the Supreme Court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the Supreme Court has appellate jurisdiction.

RULE 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.

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